CC Docket Nos. 96-98, 97-137, 97-208, 97-231

FEDERAL COMMUNICATIONS COMMISSION
COMMON CARRIER BUREAU

PRESENTS

A FORUM TO DISCUSS

"UNBUNDLED NETWORK ELEMENTS"

COMPLIANCE WITH §271 REQUIRMENT FOR NON-DISCRIMINATORY UNE COMBINATIONS ACCESS

Commission Meeting Room
Federal Communications Commission
1919 M Street, NW
Washington, DC 20544

June 4, 1998

PRELIMINARY SURVEY - STATE ACTION ON UNE COMBINATIONS

James Bradford Ramsay

Assistant General Counsel
National Association of Regulatory Utility Commissioners
1100 Pennsylvania Avenue, N.W., Suite 603
Post Office Box 684, Washington, D.C. 20044-0684
Telephone (202) 898-2200, Facsimile (202) 898-2213
Internet Home Page http://www.naruc.org

National Association of Regulatory Utility Commissioners

NARUC is a quasi-governmental nonprofit organization founded in 1889 to, inter alia, improve the quality and effectiveness of public utility regulation. Members include the commissions from all States, the District of Columbia, Puerto Rico, and the Virgin Islands, that regulate, inter alia, intrastate telecommunications services. NARUC's state members regulate the services of communications utilities operating within their respective jurisdictions. They have the duty under State law to assure the establishment and maintenance of such energy utility services as may be required by the public convenience and necessity, and to ensure that such services are provided at rates and conditions which are just, reasonable and nondiscriminatory for all consumers.

NARUC also (i) nominates state members to the 47 U.S.C. § 410 and § 254 mandated Federal-State Joint Boards, (ii) actively represents State interests in FCC dockets that impact state regulatory initiatives, and (iii) collaborates with the FCC Common Carrier Bureau in matters of common interest. [47 C.F.R. § 0.91(c) states the CCB is to "[c]ollaborate with..state [PUCs].. and [NARUC] in...studies of common carrier and related matters."

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CAVEAT

THE OPINIONS EXPRESSED IN THIS DOCUMENT ARE MY OWN – NOT NARUC'S ANY CREDIT – [or as is more likely – blame] – FOR ANY POSITIONS, STATEMENTS, MIS-STATEMENTS OR ERRORS SHOULD BE ATTRIBUTED TO ME - NOT NARUC. MUCH OF THE ANECDOTAL INFORMATION CONTAINED HEREIN WAS COLLECTED INFORMALLY.

This "draft" overview does not claim to be either comprehensive or completely correct. Because of the time constrains associated with the timing of this forum, I have collected information from a number of sources and have not had the opportunity to send my first draft out to the States for final review [and corrections].

CREDIT - ACKNOWLEDGEMENTS

A special thanks to the State Staff and Commissioners that immediately replied to my emergency request for help. Thanks also to Comptel's General Counsel Genevieve Morelli and consultant Joseph Gillian for sending me some additional information/citations on State actions at the "last minute."

PRELIMINARY SURVEY OF STATE ACTION ON UNE COMBINATIONS

James Bradford Ramsay

Assistant General Counsel
National Association of Regulatory Utility Commissioners

I. Introduction:

I was very pleased when Jake Jennings sought a NARUC representative for this Common Carrier Bureau forum to discuss possible methods by which the Bell operating companies (BOCs) may satisfy the section 271 requirement that they provide nondiscriminatory access to unbundled network elements in a manner that allows competing carriers to combine such elements.

And..though I volunteered for the slot, I was a bit less pleased when I discovered my plan to con our current Communications Committee chair - Bob Rowe - a commissioner with Montana to fly in on short notice to do the honors - was doomed to failure.

And speaking of Bob, he asked me to be sure and convey NARUC's appreciation for the CCB including a State panel as part of the forum.

My discomfiture deepened, when my LEXIS search on these issues racked up a paltry 33 new stories and 44 State cases - only a few of which were really relevant to the questions asked AND only eight States responded to my frantic e-mails for assistance.

Fortunately, Jake also told me I only had to come up with 5 minutes worth of remarks. Also fortunately for me, I stumbled across a story about General Colin Powell in a recent US News and World Report that seemed somewhat apropos for today's discussion. US News has been running a series of articles on American Generals of the 20th Century - from Black Jack Pershing up to Powell. Powell is an interesting guy - one of the few non-West Pointers to make it to the top. While serving in Viet Nam, the article reports "...Powell discovered the war's loopy logic early. He asked a Vietnamese officer why a highly vulnerable outpost was where it was. 'Very important outpost,' came the reply. 'Outpost here to protect airfield.' But why, Powell asked, was the airfield there? 'Airfield need to resupply outpost.'"

No...I'm not suggesting that Congress and the FCC...or the FCC and the States...are analogous to the outpost and the airfield. What I'm suggesting is that the issues left to me to briefly review -

(1) How states are analyzing the requirement for CLEC access to "bundled" or "combinations" of UNEs and

(2) Are states imposing any requirements pursuant to state law?

Are - like the outpost and the airfield - codependent. Move the outpost and the location of the airfield must be adjusted. Similarly, a State finding that it lacks authority to either enforce the terms of a pre-8th Circuit negotiated agreement or require rebundling as a matter of State law requires adjustments in the tack it takes with respect to requiring combinations.[1]

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[1] Ok..ok...so the analogy isn't that good. I'm sorry already...its just I've been waiting forever for the opportunity to get in that story.

I'm expecting my three co-panelists to give you a more detailed presentation on what their States have done. In my 5 minutes...I am just going to briefly tell you what has been done in States that responded to my e-mail queries. It seems that State action on the "recombination" issue - can be classified in 5 ways.

States may

1 - "Negotiate" BOC concessions on UNE recombinations as a quid pro quo for State Endorsement of the BOC's Section 271 bid at the FCC.

2 - Determine it has authority to require combinations under State law OR as a consequence of a prior arbitration order or the requirement to enforce a contract provision.

3 - Conclude that ordering combinations is preempted by the 8th Circuit ruling.

4 - Specifically reject ILEC collocation requirements to recombine elements

5 - Not have decided any issues as to whether their is authority to require recombinations or the desirability of doing so.

During the last week, I conducted a survey of the States via e-mail and a literature search. The following table give's my results. Not all states responded and/or were located via the online searches. Also - as I have not had an opportunity to send this paper back by the states THERE MAY BE SOME ERRORS INCLUDED IN THIS REPORT. Since I've started this survey - I will probably attempt to complete it and include a "corrected" version in an update to NARUC's "Status of Competition" report sometime later this year.

ARIZONA - ***Pending – Oral Argument on Rebundling Issue set for June 15, 1998.***

AZ PSC will hear oral argument on the rebundling issue and the scope of its authority to order rebundling June 15, 1998. US West has also brought up this issue of the PSC's authority to order rebundling in a District Court proceeding via a petition for clarification and/or reconsideration

ALABAMA - ***Pending - Informal Workshops on UNE Recombinations slated for June 25-26.***

AL PSC has called for informal workshops to address some of the problems we discovered in the 271 hearings. The recombination of UNEs is one of the main topics. The first workshops are scheduled for June 25-26. all the parties that participated in the 271 hearing are invited to participate in the workshops.

COLORADO - ***Finds State Authority to Require Combinations is "Not Inconsistent" with the TelAct***
- ***Is Holding Evidentiary Hearings to Determine if it Should Requires USWC Combinations***

PSC order says: " Now being duly advised in the premises, we determine that the Commission is empowered under State Law to require USWC to combine network elements for competitors as part of its obligations as an incumbent local exchange carriers. *Decision Regarding Commission Authority to Require Combination of Network Elements*, , Docket 96S331T, Adopted February 18, 1998.

FLORIDA ***Order expected today finds that a BellSouth Interconnection agreement terms does not cover combination of UNEs to provide a "completed service" and directs the parties to negotiate a new rate in those cases.*** **Docket 971140-TP.**

IDAHO ***Recombination Issue Pending.***

Idaho PSC did issue an order in the USWC / ATT arbitration case stating that USWC had to supply ATT with UNEs in "combination that are ordinarily combined in US WEST's network." However, the parties have never reached a final agreement in that case so it's still in limbo.

ILLINOIS - ***Recombination Issues Under Investigation.***

In February 98, the Illinois Commerce Commission approved a total element long run incremental cost (TELRIC) methodology for pricing of Ameritech Illinois' network elements. The Commission also required Ameritech Illinois to offer common transport and local switching on an unbundled basis. The Commission concluded that Ameritech Illinois had not provided sufficient cost support for those two elements and thus developed interim rates for those elements. The rates for the remaining elements, including a wide variety of loops, databases, etc, as well as interconnection arrangements, transport and termination, are permanent rates. The Commission also directed Ameritech Illinois to refile its network element tariffs and accompanying cost studies for review by Staff and other docket participants to ensure compliance with the Commission's Order. Compliance issues would be investigated in a follow-on proceeding. On June 2, 1998, the ICC initiated the follow-on proceeding to investigate compliance. With regard to the issue of how the Illinois Commerce Commission is attempting to ensure that alternative local exchange carriers obtain unbundled network elements in a manner in which they can combine them, the ICC has required that Ameritech Illinois detail in its unbundled network element tariffs, the terms and conditions that would make this possible. These terms and conditions will be investigated as part of the investigation that was initiated by the Commission this morning.

KANSAS - ***Order specifically rejects ILEC collocation requirements to recombine elements***

"In addition, the Commission holds that it has the authority under sections 251 and 252 of the Federal Telecommunications Act, to require SWBT to provide AT&T unfettered access to its offices in order that AT&T may do the combining of unbundled network elements." *Order Re 8th Circuit Issues*, Docket 97-AT&T-290-ARB, February 16, 1998, page 4.

MARYLAND - ***Examiner's Proposed Order Concludes Ordering Combinations is Precluded by 8th Circuit.***

Examiner's Proposed Order: "Upon review of the arguments of the parties, I find that the Eighth Circuit order precludes this Commission from directing Bell Atlantic to provide the platform as requested by AT&T and other parties in this case." *Proposed Order of Hearing Examiner*, Case No. 8731 Phase II(c), issued January 16,

MASSACHUSETTS - ***March 13 Order rejects ILEC collocation requirements to recombine elements.***
- ***Determines not to Challenge 8th Circuit Opinion at this time.***

Massachusetts Department of Telecommunications and Energy Order says "We believe, based on the record in this case, that Bell Atlantic's chosen method of provisioning UNEs solely through collocation may not be adequate to meet the Act's UNE provisioning requirements in Subsection 251(c)(3) ... Based on the record, it is clear that collocation requires a competing carrier to own a portion of a telecommunications network, so making collocation a precondition for obtaining UNEs appears to be at odds with the Eighth Circuit's findings." *Order,* DPU/DTE 96-73/64, et. al., March 13, 1998. In this Order on UNE combinations, DTE 96-73, 96-75, 96-80/81, 96-83, 96-94-Phase 4-E, the MA DTE chose not to challenge the 8th Circuit decision (now pending before the Supreme Court), which overturned the FCC's decision to require ILECs to combine UNEs and to offer the full UNE platform (UNE-P). However, the DTE also found that Bell Atlantic's plan to require collocation as the sole means for CLECs to combine UNEs violates the 8th Circuit's determination that CLECs cannot be required to "own or control some portion of a telecommunications network before being able to purchase" UNEs. Therefore, the Department ordered the parties to conduct further settlement negotiations on this issue. The DTE also noted that Bell Atlantic could consider voluntarily combining UNEs, along with a "glue charge," as suggested by FCC Commissioner Powell in the Bell South - South Carolina 271 Order. Those negotiations were not successful, so parties were directed to propose alternative ways for Bell Atlantic to allow CLECs to combine UNEs. In its April 17, 1998 Position Statement, Bell Atlantic proposed to reduce CLECs' need "to combine UNEs by voluntarily agreeing to combine certain elements," such as a "switch sub-platform that will provide a CLEC that obtains BA's unbundled local switching element with combinations of other UNEs" through

BA's shared and/or dedicated interoffice transport (at 4). However, Bell Atlantic stated that it refuses to combine the link and local switching for CLECs. Sprint testified that using UNEs as a market entry strategy is contingent on Bell Atlantic combining the link and the port, and MCI also stated that requiring Bell Atlantic to provide combinations is the only feasible method. AT&T has suggested that "Recent Change" (or "RC-MAC") technology can be used by CLECs to combine network elements, and that it would only cost the ILEC about $3 million and take only six months to modify existing network technology to conform to the use of RC- MAC. Briefs on the issue of how Bell Atlantic can provide UNEs in such a way that they can be combined by CLECs are due on June 19, with reply briefs due on June 26.

MICHIGAN - ***Finds State Authority to Require Combinations is "Not Inconsistent" with the TelAct***
- ***Requires GTE to provided Combined Elements as Sum of UNE Rates.***

MI PSC Order states: "The Commission therefore concludes that the requirement to combine elements at the request of the competitive LEC is not inconsistent with Section 251©(3) of the federal Act and may be imposed pursuant to the provisions of State law. The Commission agrees with the arbitration panel that MCA 484.2305; MSA22.1469(305) supports adopting BRE's position [requiring GTE to provide BRE combined elements at the price of the some of the rates for each of the elements] *Order Adopting Arbitration Decision*, Case No. U-11551 at Page 6.

MINNESOTA - ***February 23, 1998 PUC Claims CLEC-BOC Contracts Require UNE Combinations.***
- ***February 23, 1998 PUC Claims Independent Authority and Requires USWC Combinations.*** -

The MI commission cited two bases for its decision to reject USWC's collocation proposal. First, it determined it could order combinations under State law. Second, the Commission determined that the 8th Circuit Order did not change the terms of its interconnection agreements. "The Commission does not believe that its decision requiring USWC and MCIm to adopt the unbundled provisions in question [combinations] is necessarily inconsistent with the Court of Appeals decision. The fact that the Commission's March 17, 1997 Order explains its decision to approve AT&T's proposed unbundling language by referring to now-invalidated FCC rules does not mean that the Commission would not have made the same decision in the absence of the FCC rules and simply explained its decision using other legitimate analysis, e.g. consistency with state law and policy. *Order Denying Reconsideration*, Docket No. P-421/C-97-1348, page 4. February 23, 1998.

MONTANA - ***Order Specifically Rejects ILEC Collocation Requirements to Recombine Elements***

US West cannot have it both ways -- either it permits CLECs to purchase combined elements or it permits access to its network so that CLECs can perform the combinations, without requiring collocation. *Order on Supplemental Disputed Issues*, Docket No. D96.11.200, issued April 30, 1998, page 9.

NEW YORK - ***Agreement on UNE Terms for § 271 Endorsement***
- ***No specific ruling on scope of NY authority to order re-bundling so far.***

NY PSC had previously suggested to BA that it would be held to previous agreements to provide combined UNEs. On 3/6/98, the Chair of the NY PSC announced that - to get NY's endorsement of its § 271 application for New York, BA agreed to offer UNE recombinations for limited time, 4-6 years depending on the area of the state. It also agreed not to impose rebundling charge on UNEs used for residential service, although it will levy charge of $2-$6 for those used to provide business service. The UNE platforms are limited to the provision of ISDN and basic telephone service.

NEW JERSEY - ***Complaint Hearing to "enforce" UNE Combination Terms of Existing Agreement***

3/6/98 MCI complaint with N.J. Board of Public Utilities accuses Bell Atlantic of reneging on its local interconnection contract with MCI and failing to provide nondiscriminatory access to its OSS as required

by the Telecom Act. MCI said BA refused to allow MCI to lease recombined network elements as provided in connection contract, was charging rates not based on cost, and wasn't providing MCI with interconnection in manner at parity with what BA provides to itself. MCI asked BPU to reduce Bell Atlantic's interconnection charges to cost-based levels and compel BA to meet all obligations of its interconnection contract.

OHIO ***- Order Finds Prior BOC-CLEC Interconnection Agreement Requires Combinations***
- Commission Action Pending on UNE Docket

Ohio's efforts with respect to the recombination of UNEs have thus far been limited to pricing considerations in the Ameritech and Cincinnati Bell TELRIC proceedings currently before the Commission. In the Ameritech case, the Ohio commission has nearly completed the first phase of pricing the individual elements, and is now awaiting a response to its request for TELRICs on particular combinations. As for Cincinnati Bell, it is presently providing a switching/transport combination as part of its alt regulation agreement, but CB is watching the Supreme Court challenge of the 8th Circuit opinion closely. Earlier in *Second Entry on Rehearing,* Case No. 96-922-TP-UNC, Entered November 6, 1997, the Ohio PUC found "The Eight Circuit's Order on Rehearing notwithstanding, Ameritech's agreement, though the give and take of an arm's length negotiation process, establishes an independent basis upon which to enforce the terms of the interconnection arrangements as negotiated, and to require the company to provide TLERIC studies for certain unbundled network combinations. In so doing, we are enforcing the terms of the interconnection arrangement to which Ameritech agree. " Note the combinations issue will probably be revisited when the contract expires.

OKLAHOMA ***- Investigation Pending.***

Oklahoma Corporation Commission filed an application to review the status of local competition in OK (RM 980000004). We now have an interim order which set up a "task force" which will review the existing rules, laws etc. and make recommendations along with reviewing and investigating problems and complaints from CLECs towards LECs. At the first meeting the group listed out issues/problem areas - access to and combining UNEs were listed as items.

OREGON ***- Contract Terms Control – BOC can appeal after the Iowa Decision is "Nonappealable"***
- Pending Docket – Staff Position in Proceeding Attached.

A January 9, 1998 Order says "Sec. 19.5 [of the Interconnection Agreement] requires that any judicial action which materially affects any material term of the Agreement must be final and nonappealable before the parties undertake to modify the Agreements. The Eighth Circuit decisions regarding service quality and access to unbundled elements clearly affect material terms of the Agreements. Both AT&T and MCI have notified the Commission that they have appealed the Eighth Circuit decisions to the United States Supreme Court. That being the case, the judicial actions relied upon by the USWC are not final and nonappealable and its request to modify the Agreement is premature. *Order Denying Petition, Order* 98-021, January 9, 1998, page 2. Oregon PUC "UT 138/139" proceeding also pending to consider recombining issue. Parties filed written testimony last winter and several days of hearings a couple of months ago. CLECs all argued for ILEC combining (at no/minimal charge) and the ILECs all said combining is not required, and they would allow CLECs to combine the elements themselves at a collocated space, through a "common intermediate main distribution frame" known as a "SPOT" frame (USWC term) or a common collocated space (GTE term). Neither ILEC would allow CLECs direct access to the ILEC main distribution frame. The matter is now pending before the PUC. An Order could be out as early as the end of the summer. The PUC staff took the position that physically connecting elements was "installation" and not "combining" and that the ILECs should be required to do this. The PUC staff also said that the PUC could require ILEC combining under state law, and that collocation should not be required. The PUC staff also said, for policy reasons, that the ILECs should NOT be required to provide the CLECs a finished retail service (sometimes called the UNE-Platform) at the minimal charge suggested by the CLECs. The Commission has not made a final determination.

PENNSYLVANIA - ***Seeks UNE Terms Via "Concessions" for § 271 Endorsement***

PA PUC 4/14/98 Pa. PUC approved draft "road map" of steps Bell Atlantic must take to enter long distance in state. Proposed pre-filing statement, which would be submitted along with new § 271 application, is based on company's agreement with N.Y. regulators and covers such topics as network elements, interconnection, collocation, operational support systems. Bell Atlantic was required to file comments on the proposal by May 28; other parties have until June 28. Last order addressing BA UNE was last July.

TEXAS - ***June 1/ Proposal Suggests § 271 UNE Recombination Terms.***
- ***December 4, 1998 PUC Claims CLEC-BOC Contracts Require UNE Combinations.***

TX. PUC finalized rates CLECs must pay SWB ruling on recurring and nonrecurring charges (NRCs) for 3 main types of UNEs -- local loops, switching, transport. Commissioners also denied SWB's request to charge $40 to recombine UNEs for competitors, saying one-time charges include such cost. Collocation is only remaining issue for agency - conditions for competing companies to set up facilities in SWB offices. Commission set average monthly loop rate at $14.15, but said price will change in spring when PUC restructures state Universal Service Fund. Zone rates were set at $18.98, $13.66 and $12.14, based on wire center size and density combinations. One-time charges for basic service changes will be $2.56 for simple orders and changes and $91.93 and $62.56 respectively for complex orders and changes. Switched rates will be $2.90 per port per month and 15 cents per min. of use (MOU). Transport rates were set at 0.00021 cents per mile per MOU for common transport and 0.0399 cents for MOU for blended transport. Separate rates were set for cross-connects, toll-free directory assistance, and pole, duct and conduit charges. PUC held SWB to voluntary commitment to combine UNEs for competitors. SWB said last month that most recent ruling by 8th U.S. Appeals Court forbade agency from requiring it to recombine elements and filed proposal with agency to charge $40 for rebundling; However, PUC later ruled that SWB had previously agreed in arbitration to rebundle for competitors, and Tues. told SWB that it couldn't charge competitors new costs associated with service, saying such costs are included in NRC. *See Amendment and Clarification of Arbitration Award*, PUC Dockets Nos. 16189 et. al. page 4 "the 8th circuit's order on rehearing reveals no grounds for abrogating SWB's voluntary commitment to combine network element. During the arbitration hearing, SWB made a business decision that, despite its lack of legal obligation, it would combine network elements in lieu of providing local service providers direct access to its network."

UTAH - ***Arbitration Order Requires USWC to Provide Combined Elements..***

April 28, 1998 Utah PSC AT&T/MCI "Commission" arbitration order requires USWC to provide combined elements. The specific discussion of this issue is found at pages 45-58 of the order. USWC has requested reconsideration of this section. This the first time that the Utah Commission has addressed this issue in an order.

VERMONT - ***Proposed Order Finds VT Authority to Require Combinations "Not Inconsistent" with TelAct***
- ***Commission Action Pending/ BA Request for Oral Argument Pending.***
- ***If Approved As Proposed, Evidentiary Hearings required.***

5/12/98 - ALJ proposed decision concludes: (1) that the Telecomm Act of 1996 does not preempt states from requiring incumbent LECs from offering recombined UNEs to competitors, (2) that the 8th Circuit's decision on October 14, 1997, does not preclude states from requiring incumbent LECs from offering recombined UNEs to competitors, and (3) that Vermont law currently authorizes the Board to impose such a requirement, IF IT CONCLUDES THAT RECOMBINATION WILL PROMOTE THE PUBLIC GOOD. BA has asked for oral argument on the order. It could issue at any time. If it is adopted as drafted, the VT PSB will proceed with evidentiary hearings.

WASHINGTON - ***Finds State Authority to Require Combinations is "Not Inconsistent" with the TelAct - Requires GTE to provided Combined Elements for Network Interface Device.***

WA UTC Order says: " This Commission has an obligation to implement Washington statutes governing quality of service and incumbent discrimination against new entrants. To the extent those statutes create a need for incumbents to offer element combinations, the Commission must require them to offer combinations to the extent the commission is able to do so. The following factors [listing technical feasibility, discrimination, and quality of service] compel the Commission to resolve the pending issue in this proceeding by requiring GTE to combine elements for the Network Interface Device (NID) to the switch [.]" *Order Partially Granting Reconsideration*, Docket No. UT-960307, March 16, 1998.

W. VIRGINIA - ? [News article...I have not yet investigated to determine the WV's Precise ruling.]

6/17/97 West Virginia PSC rejects petitions for recon by AT&T, Sprint and MCI of an order related to Bell Atlantic's statement of generally available terms and conditions and to the arbitration proceeding between Bell Atlantic and AT&T, according to AT&T Government Affairs State Manager for West Virginia Edna Cash. Cash said the provision with which AT&T is most concerned is one that denied new entrants the ability to buy unbundled network elements and recombine them.

Appendices:

1 - **Vermont ALJ Proposed Order Pending Before Vermont PSB.**
2 - **Staff Testimony in Oregon UNE Proceeding.**
3 - **Excerpts from Utah's UNE Decision**

APPENDIX A – MAY 12 ALJ "PROPOSED DECISION" PENDING BEFORE VT PSB

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5713

[?1]Investigation into New England Telephone and Telegraph Company's (NET's) tariff filing re: Open Network Architecture, including the unbundling of NET's network, expanded interconnection, and intelligent networks in re: Phase II, Module Two) [?2]

Order entered:

[?3]
[?4]

PRESENT: Frederick W. Weston, III
Hearing Officer

APPEARANCES: Sheldon Katz, Esq.
for the Vermont Department of Public Service

Thomas M. Dailey, Esq.
for New England Telephone & Telegraph Company
d/b/a Bell Atlantic-Vermont

John H. Marshall, Esq.
Downs, Rachlin & Martin
for Atlantic Cellular Company, L.P. d/b/a Cellular One
and Hyperion Telecommunications of Vermont, Inc.

William B. Piper, Esq.
Paul J. Phillips, Esq.
Primmer and Piper, P.C.
for Champlain Valley Telecom, Inc.
Franklin Telephone Company
Ludlow Telephone Company
Northfield Telephone Company
Perkinsville Telephone Company
Shoreham Telephone Company, Inc.

STE/NE Acquisition Corp.
d/b/a Northland Telephone Company of Vermont, Inc.
Topsham Telephone Company, Inc.
Waitsfield-Fayston Telephone Company, Inc.
d/b/a Waitsfield Telecom

Melinda B. Thaler, Esq.
for AT&T Communications of New England, Inc.

Robert Glass, Esq.
Glass, Seigle and Liston
for MCI Telecommunications Corporation

Stephen Whitaker, *pro se*
for Design Access Network

Evelyn Bailey, Executive Director
for the Enhanced 911 Board

PHASE II ORDER RE: FEDERAL PREEMPTION OF STATES' AUTHORITY TO REQUIRE THE RECOMBINATION OF UNBUNDLED NETWORK ELEMENTS

I. INTRODUCTION

This proposed order concludes that the federal Telecommunications Act of 1996 ("Act" . The Act amends, and adds to, many sections of Title 47 of the United States Code (47 U.S.C.).) does not preempt state power to order local exchange companies ("LECs") to provide unbundled network elements ("UNEs"), on a recombined basis, to competitive LECs ("CLECs") and other telecommunications providers who request them. This order also concludes that the Public Service Board has sufficient authority under current state law to direct incumbent LECs to recombine UNEs for CLECs, if the Board concludes that such recombination is appropriate – which is to say, will promote efficient competition in the Vermont local exchange market, thus assuring consumers adequate service at just and reasonable rates.

A. Procedural Background and Scope of this Order

During a status conference (by telephone) on December 23, 1997, the New England Telephone & Telegraph Company (d/b/a Bell Atlantic-Vermont, "BAVT" or "Company"),3) does not preempt state power to order local exchange companies ("LECs") to provide unbundled network elements ("UNEs"), on a recombined basis, to competitive LECs ("CLECs") and other telecommunications providers who request them. This order also concludes that the Public Service Board has sufficient authority under current state law to direct incumbent LECs to recombine UNEs for CLECs, if the Board concludes that such recombination is appropriate – which is to say, will promote efficient competition in the Vermont local exchange market, thus assuring consumers adequate service at just and reasonable rates.

A. Procedural Background and Scope of this Order

During a status conference (by telephone) on December 23, 1997, the New England Telephone & Telegraph Company (d/b/a Bell Atlantic-Vermont, "BAVT" or "Company"),[3] 3. BAVT is a division of the Bell Atlantic Corporation, which operates in thirteen eastern states and the District of

Columbia. In this Order, "Bell Atlantic" refers to the corporation in its entirety; when it is followed by a hyphen and a state's name, it refers to the company's division operating in that state. AT&T Communications of New England, Inc. ("AT&T"), and the Department of Public Service ("Department" or "DPS") asked the Board to determine whether it has authority under Vermont law to regulate the manner in which incumbent LECs provide UNEs to CLECs and other telecommunications providers. They agreed that the Board could take up this jurisdictional question without holding evidentiary hearings, relying instead upon pleadings that they would file. A schedule for the submission of those pleadings and additional relevant documentation was set.[3]3 AT&T Communications of New England, Inc. ("AT&T"), and the Department of Public Service ("Department" or "DPS") asked the Board to determine whether it has authority under Vermont law to regulate the manner in which incumbent LECs provide UNEs to CLECs and other telecommunications providers. They agreed that the Board could take up this jurisdictional question without holding evidentiary hearings, relying instead upon pleadings that they would file. A schedule for the submission of those pleadings and additional relevant documentation was set.[3] 3. BAVT Letter 12/23/97 at 1-2; AT&T Letter 1/9/98 at 3. The parties agreed to adopt part of the record from a Massachusetts Department of Telecommunications and Energy proceeding, specifically, Dockets DPU 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Hearing Volume No. 25, December 16, 1997, which includes the testimony and relevant exhibits of Bell Atlantic witness Amy Stern and AT&T witness Robert Falcone.

The parties further agreed that, if the Board finds that it does have such authority, then it may later, in this or another proceeding, take up any remaining technical issues that UNE provision – in particular, recombination – raises.[3]3

The parties further agreed that, if the Board finds that it does have such authority, then it may later, in this or another proceeding, take up any remaining technical issues that UNE provision – in particular, recombination – raises.[3] 3. AT&T Letter 1/9/98 at 1-3. However, later in its written

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3. The Act amends, and adds to, many sections of Title 47 of the United States Code (47 U.S.C.).

3. BAVT is a division of the Bell Atlantic Corporation, which operates in thirteen eastern states and the District of Columbia. In this Order, "Bell Atlantic" refers to the corporation in its entirety; when it is followed by a hyphen and a state's name, it refers to the company's division operating in that state.

3. BAVT Letter 12/23/97 at 1-2; AT&T Letter 1/9/98 at 3. The parties agreed to adopt part of the record from a Massachusetts Department of Telecommunications and Energy proceeding, specifically, Dockets DPU 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Hearing Volume No. 25, December 16, 1997, which includes the testimony and relevant exhibits of Bell Atlantic witness Amy Stern and AT&T witness Robert Falcone.

submission, the DPS argues that a second phase in which the Board would develop a policy on UNE recombination is unnecessary and that the Board could, on the basis of the filings, reach a final determination on whether UNE recombination should be required if requested by a CLEC.[3]3 However, later in its written submission, the DPS argues that a second phase in which the Board would develop a policy on UNE recombination is unnecessary and that the Board could, on the basis of the filings, reach a final determination on whether UNE recombination should be required if requested by a CLEC.[3] 3. DPS Memorandum of Opposition to Bell Atlantic's Network Dismantlement Proposal 1/23/98 ("DPS 1/23/98") at 3. I disagree. The parties consented to brief and discuss only the narrow questions of federal preemption and state authority. A subsequent inquiry into whether and, if so, how incumbents should be required to combine, or refrain from disassembling, UNEs will likely necessitate an evidentiary record, and I therefore leave it for another time.

B. Positions of the Parties

AT&T alleges that, upon the issuance of the Eighth Circuit's Rehearing Order in a proceeding concerning the validity of rules issued by the Federal Communications Commission ("FCC") to implement provisions of the Act,[3]3 I disagree. The parties consented to brief and discuss only the narrow questions of federal preemption and state authority. A subsequent inquiry into whether and, if so, how incumbents should be required to combine, or refrain from disassembling, UNEs will likely necessitate an evidentiary record, and I therefore leave it for another time.

B. Positions of the Parties

AT&T alleges that, upon the issuance of the Eighth Circuit's Rehearing Order in a proceeding concerning the validity of rules issued by the Federal Communications Commission ("FCC") to implement provisions of the Act,[3] 3. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997); *Iowa Utilities Bd. v. FCC*, No. 96-3321 et al., 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997)("Rehearing Order" or "Eighth Circuit Decision"). The relevance of this decision to today's proposed order is described in the

3. AT&T Letter 1/9/98 at 1-3.

3. DPS Memorandum of Opposition to Bell Atlantic's Network Dismantlement Proposal 1/23/98 ("DPS 1/23/98") at 3.

following sections. Bell Atlantic-Massachusetts made the decision to "rescind prior commitments and representations as to its willingness to provide unbundled network element combinations."[3]3 Bell Atlantic-Massachusetts made the decision to "rescind prior commitments and representations as to its willingness to provide unbundled network element combinations."[3] 3. Memorandum of AT&T Communications of New England, Inc. 1/23/98 ("AT&T 1/23/98") at 4. AT&T asserts that Bell Atlantic's proposed changes to UNE provisioning in that state have implications for its UNE provisioning in Vermont. According to AT&T, such a UNE provisioning policy would be unnecessary, costly, and detrimental to service quality.[3]3 AT&T asserts that Bell Atlantic's proposed changes to UNE provisioning in that state have implications for its UNE provisioning in Vermont. According to AT&T, such a UNE provisioning policy would be unnecessary, costly, and detrimental to service quality.[3] 3. "The real issue," according to AT&T, "is not whether Bell Atlantic can be required to 'assist' CLECs by combining UNEs, but rather whether Bell Atlantic can be prohibited from affirmatively harming competitors and competition by doing needless, costly, and destructive disassembly of network elements that have already been physically combined." AT&T 1/23/98 at 11. AT&T asks that the Board order BAVT to refrain from disassembling "existing combinations of unbundled network elements, and more generally require Bell Atlantic to provide unbundled network combinations to competing local exchange carriers."[3]3 AT&T asks that the Board order BAVT to refrain from disassembling "existing combinations of unbundled network elements, and more generally require Bell Atlantic to provide unbundled network combinations to competing local exchange carriers."[3] 3. *Id.* at.10. AT&T asserts that, if the Board agrees with AT&T as to the extent of the Board's ability under Vermont law to mandate UNE provisioning according to AT&T's view, then in the subsequent phase to this proceeding, AT&T will argue that the Board should order BAVT to provide unbundled network combinations in order to further the Board's pro-competition goals. *Id.* The DPS joins in AT&T's request.[3]3 The DPS joins in AT&T's request.[3] 3.

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3. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997); *Iowa Utilities Bd. v. FCC*, No. 96-3321 et al., 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997)("Rehearing Order" or "Eighth Circuit Decision"). The relevance of this decision to today's proposed order is described in the following sections.

3. Memorandum of AT&T Communications of New England, Inc. 1/23/98 ("AT&T 1/23/98") at 4.

3. "The real issue," according to AT&T, "is not whether Bell Atlantic can be required to 'assist' CLECs by combining UNEs, but rather whether Bell Atlantic can be prohibited from affirmatively harming competitors and competition by doing needless, costly, and destructive disassembly of network elements that have already been physically combined." AT&T 1/23/98 at 11.

3. *Id.* at 10. AT&T asserts that, if the Board agrees with AT&T as to the extent of the Board's ability under Vermont law to mandate UNE provisioning according to AT&T's view, then in the subsequent phase to this

DPS 1/23/98 at 3 n.2. In response, BAVT argues that, even if state law would permit the Board to consider a requirement for BAVT to provide combined UNEs, such authority has been preempted by the Act.[3]3 In response, BAVT argues that, even if state law would permit the Board to consider a requirement for BAVT to provide combined UNEs, such authority has been preempted by the Act.[3]

3. Memorandum of Law of Bell Atlantic-Vermont 1/23/98 ("BAVT 1/23/98") at 1.

II. FEDERAL PREEMPTION OF STATE LAW

In the Rehearing Order, the Eighth Circuit concluded that § 251(c)(3) of the Act does not require incumbent LECs such as BAVT to combine UNEs for CLECs, and the Court therefore vacated an FCC rule mandating such "recombination." Among other things, this section of the Act imposes upon incumbents the duty:

> [T]o provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.[3]3

II. FEDERAL PREEMPTION OF STATE LAW

In the Rehearing Order, the Eighth Circuit concluded that § 251(c)(3) of the Act does not require incumbent LECs such as BAVT to combine UNEs for CLECs, and the Court therefore vacated an FCC rule mandating such "recombination." Among other things, this section of the Act imposes upon incumbents the duty:

[T]o provide, to any requesting telecommunications carrier for the provision of a

proceeding, AT&T will argue that the Board should order BAVT to provide unbundled network combinations in order to further the Board's pro-competition goals. *Id.*

3. DPS 1/23/98 at 3 n.2.

3. Memorandum of Law of Bell Atlantic-Vermont 1/23/98 ("BAVT 1/23/98") at 1.

> telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.[3] 3. Act, § 251(c)(3).

The Eighth Circuit concluded that the second (and final) sentence of this section "unambiguously indicates that requesting carriers will combine the unbundled elements themselves," and that "this language cannot be read to levy a duty on the incumbent LECs to do the actual combining of elements."[3]3

The Eighth Circuit concluded that the second (and final) sentence of this section "unambiguously indicates that requesting carriers will combine the unbundled elements themselves," and that "this language cannot be read to levy a duty on the incumbent LECs to do the actual combining of elements."[3] 3. Rehearing Order at 813.

BAVT argues that the Board has no authority to "lawfully compel BAVT to provide 'combined' network elements to other telecommunications carriers."[3]3

BAVT argues that the Board has no authority to "lawfully compel BAVT to provide 'combined' network elements to other telecommunications carriers."[3] 3. BAVT 1/23/98 at 11. It contends that § 251(c)(3) of the Act requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. In other words, argues BAVT, § 251(c)(3) does not permit a new entrant to purchase assembled platforms of combined network elements (or a lesser combination of elements) in order to offer competitive telecommunications services.[3]3 It contends that § 251(c)(3) of the Act requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. In other words, argues BAVT, § 251(c)(3) does not permit a new entrant to purchase assembled platforms of combined network elements (or a lesser combination of elements) in order to offer competitive

3. Act, § 251(c)(3).
3. Rehearing Order at 813.

telecommunications services.[3] 3. Hence the term, UNE-P, or "unbundled network element platform." According to BAVT, to permit this and to require access to already-combined network elements at cost-based rates for unbundled access would destroy the careful distinctions which Congress established in §§ 252(c)(3) and (4) between unbundled elements on the one hand and the purchase, for resale purposes, of an incumbent's entire retail services on the other hand.[3]3 According to BAVT, to permit this and to require access to already-combined network elements at cost-based rates for unbundled access would destroy the careful distinctions which Congress established in §§ 252(c)(3) and (4) between unbundled elements on the one hand and the purchase, for resale purposes, of an incumbent's entire retail services on the other hand.[3] 3. BAVT 1/23/98 at 2, 7-9.

BAVT also argues that the Eighth Circuit vacated the FCC requirement that incumbent LECs offer combined network elements to other providers "not because the authority to impose that requirement was reserved to the States, but rather because [the rules] could not be 'squared with,' and were 'contrary to,' the Telecommunications Act of 1996."[3]3

BAVT also argues that the Eighth Circuit vacated the FCC requirement that incumbent LECs offer combined network elements to other providers "not because the authority to impose that requirement was reserved to the States, but rather because [the rules] could not be 'squared with,' and were 'contrary to,' the Telecommunications Act of 1996."[3] 3. *Id.* at 1-2. Under the Supremacy Clause of the U.S. Constitution and the doctrine of preemption, argues BAVT, the Eighth Circuit's interpretation of the Act is equally applicable to the States. Consequently, asserts BAVT, the Board cannot impose a like condition upon the Company in Vermont.[3]3 Under the Supremacy Clause of the U.S. Constitution and the doctrine of preemption, argues BAVT, the Eighth Circuit's interpretation of the Act is equally applicable to the States. Consequently, asserts BAVT, the Board cannot impose a like condition upon the Company in Vermont.[3] 3. *Id.*

I do not agree. The Board is not preempted by the Act from taking action in this respect. The Eighth Circuit's decision went to the validity of FCC rules and the nature of FCC authority under the Act. To the extent that the Court considered State authority at all, it observed that States

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3. BAVT 1/23/98 at 11.
3. Hence the term, UNE-P, or "unbundled network element platform."
3. BAVT 1/23/98 at 2, 7-9.
3. *Id.* at 1-2.

retain independent power to develop interconnection and access requirements.[3]3

I do not agree. The Board is not preempted by the Act from taking action in this respect. The Eighth Circuit's decision went to the validity of FCC rules and the nature of FCC authority under the Act. To the extent that the Court considered State authority at all, it observed that States retain independent power to develop interconnection and access requirements.[3] 3. Rehearing Order at 806. The Act recognizes that role of the States; § 251(d)(3) expressly provides:

> (3) PRESERVATION OF STATE ACCESS REGULATIONS – In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order or policy of a State commission that –
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) ***is consistent*** with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[3]3 The Act recognizes that role of the States; § 251(d)(3) expressly provides:
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> (A) establishes access and interconnection obligations of local exchange carriers;
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> (B) ***is consistent*** with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[3] 3. Emphasis added.

In addition, §§ 261(b)-(c) of the Act state:

> (b) EXISTING STATE REGULATIONS – Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are ***not inconsistent with*** the provisions of this part.
>
> (c) ADDITIONAL STATE REQUIREMENTS – Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange

3. *Id.*

> service or exchange access, as long as the State's requirements are ***not inconsistent with*** this part or the Commission regulations to implement this part.[3]3

In addition, §§ 261(b)-(c) of the Act state:

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> (c) ADDITIONAL STATE REQUIREMENTS – Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are ***not inconsistent with*** this part or the Commission regulations to implement this part.[3] 3. Emphasis added.

These sections establish Congressional intent not to preempt access and interconnection requirements adopted and enforced by States, unless the state requirements are inconsistent with the Act.

The Supremacy Clause (Art. VI, cl. 2) of the United States Constitution provides the federal government with the power to preempt state law.[3]3

These sections establish Congressional intent not to preempt access and interconnection requirements adopted and enforced by States, unless the state requirements are inconsistent with the Act.

The Supremacy Clause (Art. VI, cl. 2) of the United States Constitution provides the federal government with the power to preempt state law.[3] 3. Assuming, of course, that Congress is acting within the scope of its legitimate authority. No party in the current proceeding has suggested that regulation of telephone rates is outside the scope of Congressional authority. To determine whether a state statute or regulation is preempted by federal law, the fundamental inquiry is whether Congress intended to preempt the state.[3]3 To determine whether a state statute or regulation is preempted by federal law, the

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3. Rehearing Order at 806.
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fundamental inquiry is whether Congress intended to preempt the state.[3] 3. *E.g., Medtronic, Inc. v. Lohr*, 64 U.S.L.W. 4625, 4629 (1996); *Schneidewind v. ANR Pipeline Co. and ANR Storage Co.*, 108 S.Ct. 1145, 1150 (1988). This inquiry ". . . starts with the basic assumption that Congress did not intend to displace state law."[3]3 This inquiry ". . . starts with the basic assumption that Congress did not intend to displace state law."[3] 3. *Maryland v Louisiana*, 451 U.S. 725, 746 (1981); *see also Medtronic*, 64 U.S.L.W. at 4629; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25 at 479-480 (2d ed. 1988). This presumption against preemption is especially strong when Congress has legislated in an area historically subject to regulation by the states: "we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[3]3 This presumption against preemption is especially strong when Congress has legislated in an area historically subject to regulation by the states: "we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[3] 3. *Medtronic*, 64 U.S.L.W. at 4629 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2618 (1992).

Courts customarily treat preemption as falling into one of three general categories – express preemption, implied preemption, and conflict preemption – although, as Professor Tribe notes, the categories "are anything but analytically air-tight."[3]3

Courts customarily treat preemption as falling into one of three general categories – express preemption, implied preemption, and conflict preemption – although, as Professor Tribe notes, the categories "are anything but analytically air-tight."[3] 3. L. TRIBE, *supra*, § 6-25 at 481 n.14; *Schneidewind*, 108 S.Ct at 1150. The first category, express preemption, exists when Congress expressly states its intention to preclude state action.[3]3 The first category, express preemption, exists when Congress expressly states its intention to preclude state action.[3] 3. *Id.*; L. TRIBE, *supra*, § 6-25 at 481 n.14. Implied preemption is found when the structure or objectives of federal law

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current proceeding has suggested that regulation of telephone rates is outside the scope of Congressional authority.

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3. *Medtronic*, 64 U.S.L.W. at 4629 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2618 (1992).

demonstrate that Congress intended to preclude state law.[3]3 Implied preemption is found when the structure or objectives of federal law demonstrate that Congress intended to preclude state law.[3] 3. *Schneidewind*, 108 S.Ct. at 1150; L. TRIBE, *supra*, § 6-25 at 481 n.14. Conflict preemption results when state law actually conflicts with federal law, either due to the physical impossibility of complying with both laws or to a state regulation obstructing the accomplishment of the full objectives of Congress.[3] 3 Conflict preemption results when state law actually conflicts with federal law, either due to the physical impossibility of complying with both laws or to a state regulation obstructing the accomplishment of the full objectives of Congress.[3] 3. *Schneidewind*, 108 S.Ct. at 1150-1151; L. TRIBE, *supra*, § 6-25 at 481 n.14.

In recent decisions, the United States Supreme Court has somewhat truncated this traditional three-part preemption analysis. Specifically, the Court has noted that:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.[3]3

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familiar principle of *expression unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.[3] 3. *Cipollone,* 112 S.Ct. at 2618 (citations omitted); *see also Medtronic,* 64 U.S.L.W. at 4629.

When Congress so includes an express preemption provision in its legislation, a court must of course construe that statutory language to determine the scope of that preemption.[3]3

When Congress so includes an express preemption provision in its legislation, a court must of course construe that statutory language to determine the scope of that preemption.[3] 3. *Medtronic,* 64 U.S.L.W. at 4629. This exercise in statutory construction must be informed both by the ultimate goal of ascertaining Congressional intent and by the presumption against preemption, a presumption that (as noted above) is particularly powerful when Congress has legislated in an area historically subject to regulation by the state.[3]3 This exercise in statutory construction must be informed both by the ultimate goal of ascertaining Congressional intent and by the presumption against preemption, a presumption that (as noted above) is particularly powerful when Congress has legislated in an area historically subject to regulation by the state.[3] 3. *Id.* at 4629-4630.

In considering the overall scope of preemption implied by the subsections of §§ 251 and 261 quoted above, we must bear in mind that State access and interconnection policies need only be "consistent with" the Act.[3]3

In considering the overall scope of preemption implied by the subsections of §§ 251 and 261 quoted above, we must bear in mind that State access and interconnection policies need only be "consistent with" the Act.[3] 3. Since Congress included in the federal statute provisions that explicitly address the preemption of state authority, the scope of preemption is determined by the terms of those express provisions, with this determination measured against the touchstone of Congressional intent and informed by the strong presumption against preemption in this field historically subject to regulation by the states. *Medtronic,* 64 U.S.L.W. at 4629; *Cipollone,* 112 S.Ct. at 2618. Those express provisions convey in unambiguous terms the Congressional intent not to broadly preempt state action. Instead, those provisions demonstrate that states have primary jurisdiction over interconnection and access, and are preempted only from

3. *Cipollone,* 112 S.Ct. at 2618 (citations omitted); *see also Medtronic,* 64 U.S.L.W. at 4629.
3. *Medtronic,* 64 U.S.L.W. at 4629.
3. *Id.* at 4629-4630.

imposing requirements that are inconsistent with relevant provisions of the Act and FCC regulations. This conclusion is in keeping with the Supreme Court's command in *Cipollone* that ". . . we must construe these provisions in light of the presumption against the pre-emption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading of [the statutory preemption provision]."[3]3 Those express provisions convey in unambiguous terms the Congressional intent not to broadly preempt state action. Instead, those provisions demonstrate that states have primary jurisdiction over interconnection and access, and are preempted only from imposing requirements that are inconsistent with relevant provisions of the Act and FCC regulations. This conclusion is in keeping with the Supreme Court's command in *Cipollone* that ". . . we must construe these provisions in light of the presumption against the pre-emption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading of [the statutory preemption provision]."[3] 3. *Cipollone*, 112 S.Ct. at 2618. This is also in keeping with the conclusion that "consistent with" does not require that States implement regulatory policies that are identical to those that will prevail at the Federal level.[3]3 This is also in keeping with the conclusion that "consistent with" does not require that States implement regulatory policies that are identical to those that will prevail at the Federal level.[3] 3. See *Environmental Defense Fund, Inc. v. E.P.A.*, 82 F.3d 451 (D.C. Cir. 1996)("consistent with" does not require exact correspondence, but only congruity or compatibility). Note also that, in the Rehearing Order (at 806-807), the Eighth Circuit reaches the same conclusion.

Finally, I note that BAVT's reading of the Eighth Circuit's interpretation of § 251(c)(3), taken to its logical extreme, would lead one to conclude that the Act contains an outright prohibition against UNE combination. There is no support for this conclusion, either in the Eighth Circuit Decision or in the Act itself. Nowhere in either is there a suggestion that LECs or CLECs may not voluntarily agree to combine UNEs or that such a practice is unlawful. The Eighth Circuit Decision merely states that the FCC cannot require such a practice.[3]3

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3. Since Congress included in the federal statute provisions that explicitly address the preemption of state authority, the scope of preemption is determined by the terms of those express provisions, with this determination measured against the touchstone of Congressional intent and informed by the strong presumption against preemption in this field historically subject to regulation by the states. *Medtronic*, 64 U.S.L.W. at 4629; *Cipollone*, 112 S.Ct. at 2618.

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III. ISSUE PRECLUSION

BAVT also argues that AT&T and the DPS are precluded under the doctrine of collateral estoppel (issue preclusion) from raising UNE-platform issues in this docket.[3]3 At this time I do not reach the issue of whether it would be appropriate under Vermont law to require BAVT to combine UNEs, but I do conclude that such a decision may be consistent with the purpose of the Act to promote competition in the market for local exchange service. For all these reasons, I conclude that neither the Act nor the Eighth Circuit's decision precludes the Board from considering whether it is appropriate for BAVT to make available combined network elements for requesting CLECs.

III. ISSUE PRECLUSION

BAVT also argues that AT&T and the DPS are precluded under the doctrine of collateral estoppel (issue preclusion) from raising UNE-platform issues in this docket.[3] 3. BAVT 1/23/98 at 15, citing *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) and Rehearing Order. Specifically, BAVT argues that "[h]aving litigated and lost the issue of combined network elements before the Eighth Circuit, the doctrine of issue preclusion mandates that the [CLECs] not be permitted to relitigate the

807), the Eighth Circuit reaches the same conclusion.

3. Rehearing Order at 813.

same issue before the Board."[3]3 Specifically, BAVT argues that "[h]aving litigated and lost the issue of combined network elements before the Eighth Circuit, the doctrine of issue preclusion mandates that the [CLECs] not be permitted to relitigate the same issue before the Board."[3] 3. *Id.* For the reasons that follow, I conclude that the parties are not barred from raising the question of the Board's authority to consider UNE combination.

Before precluding relitigation of an issue, a court must "examine the first action and the treatment the issue received in it."[3]3 For the reasons that follow, I conclude that the parties are not barred from raising the question of the Board's authority to consider UNE combination.

Before precluding relitigation of an issue, a court must "examine the first action and the treatment the issue received in it."[3] 3. *State v. Pollander*, No. 96-387 Slip Op. at 3 (Vt. Supreme Court, Dec. 5, 1997). Also, as proponent, BAVT has the burden of establishing that the prior litigation bars the parties from raising, and therefore the Board from considering, whether the Board has authority over the provisioning of UNE combinations.[3]3 Also, as proponent, BAVT has the burden of establishing that the prior litigation bars the parties from raising, and therefore the Board from considering, whether the Board has authority over the provisioning of UNE combinations.[3] 3. *Ianelli v. Standish*, 156 Vt. 386, 388 (1991). The Vermont Supreme Court held, in *Trepanier v. Getting Organized, Inc.*, that the application of "issue preclusion" involves a determination of five factors. [3] 3 The Vermont Supreme Court held, in *Trepanier v. Getting Organized, Inc.*, that the application of "issue preclusion" involves a determination of five factors. [3] 3. *Trepanier v. Getting Organized, Inc.*,155 Vt. at 265 (1990); *State v. Stearns*, 159 Vt. 266, 268, 617 A.2d 140, 141 (1992). For the purposes of this analysis, I will focus first upon the third factor set out in *Trepanier* – that is, is the issue the same as the one previously litigated? – before looking at the other elements. Absent a demonstration that there is an identity of issues between the question of Board authority being raised in this docket and the issues raised in the Eighth Circuit case, collateral estoppel cannot bar consideration of the Board's authority.

In their arguments on preemption (already discussed), the parties confront the question of

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3. BAVT 1/23/98 at 15, citing *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) and Rehearing Order.
3. *Id.*
3. *State v. Pollander*, No. 96-387 Slip Op. at 3 (Vt. Supreme Court, Dec. 5, 1997).

whether the issue raised in this docket is the same as that which was taken up in the earlier action. AT&T and the Department contend that the Eighth Circuit ruled on whether the FCC was justified in developing its unbundling regulations. They also argue that the Court never considered the state role in the unbundling process. Finally, they contend that, had that question been considered, the Court's discourse on the point would have been *dicta* only and, as such, inessential to its holding. BAVT, on the other hand, argues that the Eighth Circuit Decision was not jurisdictional but, rather, dispositive on the substance of the issue, when it concluded that mandating UNE combinations is inconsistent with § 251(c)(3) of the Act.

In its Rehearing Order, the Eighth Circuit ruled on two issues that are relevant to the question before the Board now: one, the FCC's authority with respect to unbundling generally and, two, its specific proposal for network element unbundling practices.[3]3 For the purposes of this analysis, I will focus first upon the third factor set out in *Trepanier* – that is, is the issue the same as the one previously litigated? – before looking at the other elements. Absent a demonstration that there is an identity of issues between the question of Board authority being raised in this docket and the issues raised in the Eighth Circuit case, collateral estoppel cannot bar consideration of the Board's authority.

In their arguments on preemption (already discussed), the parties confront the question of whether the issue raised in this docket is the same as that which was taken up in the earlier action. AT&T and the Department contend that the Eighth Circuit ruled on whether the FCC was justified in developing its unbundling regulations. They also argue that the Court never considered the state role in the unbundling process. Finally, they contend that, had that question been considered, the Court's discourse on the point would have been *dicta* only and, as such, inessential to its holding. BAVT, on the other hand, argues that the Eighth Circuit Decision was not jurisdictional but, rather, dispositive on the substance of the issue, when it concluded that mandating UNE combinations is inconsistent with § 251(c)(3) of the Act.

In its Rehearing Order, the Eighth Circuit ruled on two issues that are relevant to the question before the Board now: one, the FCC's authority with respect to unbundling generally and,

3. *Ianelli v. Standish*, 156 Vt. 386, 388 (1991).

3. *Trepanier v. Getting Organized, Inc.*,155 Vt. at 265 (1990); *State v. Stearns*, 159 Vt. 266, 268, 617 A.2d 140, 141 (1992).

two, its specific proposal for network element unbundling practices.[3] 3. Other state commissions agree with this characterization of the Eighth Circuit's Rehearing Order. See, *e.g., In the matter of the petition of BRE Communications, L.L.C. for arbitration of interconnection terms, conditions, and prices from GTE North Incorporated and Contel of the South, Inc., d/b/a GTE Systems of Michigan*, Michigan Public Service Commission Case No. U-11551, Order of 1/28/98, at 4-6. The Eighth Circuit expressly characterizes its inquiry as the review of a final order issued by the FCC pursuant to federal statute.[3]3 The Eighth Circuit expressly characterizes its inquiry as the review of a final order issued by the FCC pursuant to federal statute.[3]

3. Rehearing Order at 792. In the current docket, it is the Board's authority, and not the FCC's, that is at issue.[3]3 In the current docket, it is the Board's authority, and not the FCC's, that is at issue.[3] 3. It is common for a federal agency and similar state agencies to concurrently consider related issues, *e.g.*, the current FCC Notice of Proposed Rulemaking on measurement and performance of Operational Support Systems (OSS) and numerous states' proceedings on OSS costs and cost allocations. Here the Board must consider whether the Act according to the Eighth Circuit Decision preempts it, acting under state authority, from considering UNE combination. Accordingly, the issue is not the same as that addressed by the Eighth Circuit and collateral estoppel does not apply.[3]3 Here the Board must consider whether the Act according to the Eighth Circuit Decision preempts it, acting under state authority, from considering UNE combination. Accordingly, the issue is not the same as that addressed by the Eighth Circuit and collateral estoppel does not apply.[3] 3. Absent a showing that the issues are the same, there is little sense in providing an extended discussion of the other *Trepanier* elements. However, to be thorough, I quickly consider each of the remaining elements: (1) *Preclusion must be asserted against one who was a party or in privity with a party in the earlier action.* This case involves many of the same parties as those that participated in the Eighth Circuit case, including AT&T, MCI, Sprint, and Bell Atlantic; however, the Department was not a party. Thus, element one is not met. (2) *The issue was resolved by a final judgment on the merits.* Related to this factor is the precept that preclusion applies only to an issue which was necessary and essential to the resolution of the prior case. See, *e.g., State v. Pollander*, No. 96-387 Slip Op. at 3 (Vt. Supreme court, Dec. 5, 1997); *Berisha v. Hardy*,

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3. Other state commissions agree with this characterization of the Eighth Circuit's Rehearing Order. See, *e.g., In the matter of the petition of BRE Communications, L.L.C. for arbitration of interconnection terms, conditions, and prices from GTE North Incorporated and Contel of the South, Inc., d/b/a GTE Systems of Michigan*, Michigan Public Service Commission Case No. U-11551, Order of 1/28/98, at 4-6.

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144 Vt. 136, 138, 474 A2d. 90, 91 (1984); *Longariello v. Windham Southwest Supervisory Union*, No. 95-275 Slip Op. (Vt. Supreme Court, May 31, 1996); *In Re Application of Carrier*, 155 Vt. 152, 157 (1990). No party has argued that the Rehearing Order was not a final judgment; however, because the issue of the Board's authority was not addressed, this element is not met. (4) *There was a full and fair opportunity to litigate the issue in the earlier action.* I am not persuaded that there was a full and fair opportunity to litigate this matter in the prior proceeding. For the reasons articulated under the third *Trepanier* element above, the same issue was not addressed and, therefore, there was no opportunity to litigate the Board's authority in this context. (5) *Applying collateral estoppel in the subsequent action must be fair.* I am not persuaded that application of collateral estoppel in this proceeding would be fair, inasmuch as the Board's authority to consider this issue has never been raised until now.

IV. BOARD AUTHORITY UNDER STATE LAW

There is no dispute among the parties that, if the Board is not preempted by the Act or precluded by federal case law from ordering UNE combinations, existing state statutes and precedents accord the Board sufficient authority to do so. AT&T cites 30 V.S.A. § 209(a)(3) and the Board's February 21, 1986, Order in Docket 4946 in support of its argument.[3]3

IV. BOARD AUTHORITY UNDER STATE LAW

There is no dispute among the parties that, if the Board is not preempted by the Act or precluded by federal case law from ordering UNE combinations, existing state statutes and precedents accord the Board sufficient authority to do so. AT&T cites 30 V.S.A. § 209(a)(3) and the Board's February 21, 1986, Order in Docket 4946 in support of its argument.[3] 3. AT&T 1/23/98 at 25-28. The DPS relies primarily on the Board's May 29, 1996, Order in Phase I of this docket when

3. Absent a showing that the issues are the same, there is little sense in providing an extended discussion of the other *Trepanier* elements. However, to be thorough, I quickly consider each of the remaining elements: (1) *Preclusion must be asserted against one who was a party or in privity with a party in the earlier action.* This case involves many of the same parties as those that participated in the Eighth Circuit case, including AT&T, MCI, Sprint, and Bell Atlantic; however, the Department was not a party. Thus, element one is not met. (2) *The issue was resolved by a final judgment on the merits.* Related to this factor is the precept that preclusion applies only to an issue which was necessary and essential to the resolution of the prior case. See, *e.g., State v. Pollander*, No. 96-387 Slip Op. at 3 (Vt. Supreme court, Dec. 5, 1997); *Berisha v. Hardy*, 144 Vt. 136, 138, 474 A2d. 90, 91 (1984); *Longariello v. Windham Southwest Supervisory Union*, No. 95-275 Slip Op. (Vt. Supreme Court, May 31, 1996); *In Re Application of Carrier*, 155 Vt. 152, 157 (1990). No party has argued that the Rehearing Order was not a final judgment; however, because the issue of the Board's authority was not addressed, this element is not met. (4) *There was a full and fair opportunity to litigate the issue in the earlier action.* I am not persuaded that there was a full and fair opportunity to litigate this matter in the prior proceeding. For the reasons articulated under the third *Trepanier* element above, the same issue was not addressed and, therefore, there was no opportunity to litigate the Board's authority in this context. (5) *Applying collateral estoppel in the subsequent action must be fair.* I am not persuaded that application of collateral estoppel in this proceeding would be fair, inasmuch as the Board's authority to consider

it asserts that the Board currently has authority to require UNE combinations, and it also suggests that Vermont's general policies in favor of the competitive delivery of telecommunications services, as set out in 30 V.S.A. §§ 202c(b)(2), 226b(b)(9), and 227a, further support its position.[3]3 The DPS relies primarily on the Board's May 29, 1996, Order in Phase I of this docket when it asserts that the Board currently has authority to require UNE combinations, and it also suggests that Vermont's general policies in favor of the competitive delivery of telecommunications services, as set out in 30 V.S.A. §§ 202c(b)(2), 226b(b)(9), and 227a, further support its position.[3] 3. DPS 1/23/98 at 16-18. Here the DPS's logic presumes that the availability of UNE combinations will promote competition and thus the general good. At this time, that is an assumption merely, as yet untested in the hearing room. In contrast, Bell Atlantic does not even reach the question, instead arguing only that the Board is preempted by the Act and the Eighth Circuit's decision.[3]3 In contrast, Bell Atlantic does not even reach the question, instead arguing only that the Board is preempted by the Act and the Eighth Circuit's decision.[3] 3. BAVT 1/23/98 at 11, fn. 26. The Company states merely that "Presumably, the state authority to mandate [UNE combinations] would be 30 V.S.A. §§ 203 and 209. . . ."

I conclude that existing Vermont statutes and case law provide the Board sufficient authority to consider the questions surrounding UNE combinations. The analysis of the Board's legal authority "to implement rules and procedures for the competitive delivery of local exchange services" that was performed in Phase I of this docket lays this question to rest. I refer the parties to that discussion; there is no need to repeat it here.[3]3

I conclude that existing Vermont statutes and case law provide the Board sufficient authority to consider the questions surrounding UNE combinations. The analysis of the Board's legal authority "to implement rules and procedures for the competitive delivery of local exchange services" that was performed in Phase I of this docket lays this question to rest. I refer the parties to that discussion; there is no need to repeat it here.[3] 3. Phase I Order at 8-14. Let me state clearly that this conclusion is not the same as finding that, as the DPS argues, mandating UNE combinations would promote

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this issue has never been raised until now.

3. AT&T 1/23/98 at 25-28.

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3. BAVT 1/23/98 at 11, fn. 26. The Company states merely that "Presumably, the state authority to mandate

competition. DPS, 1/23/98, at 16. Simply, in the context of determining what policies (competitive or otherwise) will promote the public good, the Board is entirely within its authority when it considers whether the availability of UNE combinations will serve that end.

V. CONCLUSION

For the foregoing reasons, I conclude that the Board is not preempted by federal law or precluded by the Eighth Circuit's Rehearing Order from examining whether incumbent LECs should be required to offer combined UNEs to competitive providers. In addition, I conclude that, under current state law, the Board has the authority to do so.[3]3

V. CONCLUSION

For the foregoing reasons, I conclude that the Board is not preempted by federal law or precluded by the Eighth Circuit's Rehearing Order from examining whether incumbent LECs should be required to offer combined UNEs to competitive providers. In addition, I conclude that, under current state law, the Board has the authority to do so.[3] 3. These conclusions are consistent with those reached in the recent proposal for decision issued on March 27, 1998, in this docket (Phase II, Module One). In considering whether the Eighth Circuit's ruling with respect to the FCC's "pick and choose" rule preempts the Board from adopting its own pick and choose requirement, I concluded that "it is difficult to see how the FCC's pick and choose rule, and the Eighth Circuit's overturning of it, can be construed as preemptive of state action. I agree with the Department that the Board is well within its authority to consider the question." Phase II, Module One, proposal for decision, 3/27/98, at 35, referring to *Iowa Utilities Board v. FCC*, No. 96-3321, 1997 WL 403401 (July 18, 1997).

It is therefore necessary to address the factual and policy issues related to UNE combinations. Should evidence and testimony on the issue be presented? If so, should the question be taken up in this phase of the docket or in a later one, or in another docket altogether? I direct the parties to file, with their comments on this proposal for decision, recommendations for how to proceed in this matter.

[UNE combinations] would be 30 V.S.A. §§ 203 and 209. . . ."

3. Phase I Order at 8-14. Let me state clearly that this conclusion is not the same as finding that, as the DPS argues, mandating UNE combinations would promote competition. DPS, 1/23/98, at 16. Simply, in the context of determining what policies (competitive or otherwise) will promote the public good, the Board is entirely within its authority when it considers whether the availability of UNE combinations will serve that end.

This proposal for decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

DATED at Montpelier, Vermont, this _____ day of _____, 1998.

Frederick W. Weston, III
Hearing Officer

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The conclusions and recommendations of the Hearing Officer are adopted.

2. The Hearing Officer shall set a procedural schedule, hear evidence, and issue a recommended decision for resolving the factual and policy issues relating to the provision by incumbent local exchange companies of combinations of unbundled network elements.

Dated at Montpelier, Vermont, this _____ day of _____, 1998.

)
) PUBLIC SERVICE
)
) BOARD
)
) OF VERMONT
)

OFFICE OF THE CLERK

Filed:

Attest: _____
Clerk of the Board

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board of any technical errors, in order that any necessary corrections may be made.

Q. PLEASE STATE YOUR NAME, OCCUPATION AND BUSINESS ADDRESS.

A. My name is Jack P. Breen III. I am employed by the Public Utility Commission of Oregon (PUC) as a Senior Telecommunications Analyst in the Telecommunications Division. My business address is 550 Capitol St. NE, Salem, Oregon.

Q. WHAT IS THE PURPOSE OF THIS TESTIMONY?

A. I address issues raised by U S WEST Communications, Inc. (USWC) and GTE Northwest Incorporated (GTE) in their January 15, 1998, filings.

Q. HAVE YOU TESTIFIED PREVIOUSLY IN THIS PROCEEDING?

A. Yes. I submitted Direct Testimony on September 12, 1997. I submitted Reply Testimony on November 7, 1997. I gave oral testimony on December 4, 1997.

Q. DID YOU PREPARE AN EXHIBIT FOR THIS TESTIMONY?

A. Yes. I prepared Exhibit Staff/16, which is a one page USWC diagram with my handwritten notes.

Q. HOW IS YOUR TESTIMONY ORGANIZED?

A. My testimony is organized as follows:

1) Summary
2) An assessment of the necessity of the changes proposed by the Incumbent Local Exchange Carriers (ILECs)
3) A reply to the USWC testimony and Response to the Revised Request for Specifications filed by USWC (USWC Response to the Request)
4) A reply to the GTE testimony and Revised Request for Specifications filed by GTE (GTE Response to the Request).

1. Summary

Q. PLEASE SUMMARIZE YOUR VIEW OF THE ILECS' PROPOSALS FOR INTERCONNECTION WITH THE CLECS.

A. The ILECs' proposals hinge on a faulty assessment of responsibilities. The ILECs believe that when a CLEC purchases building blocks from the ILEC, the ILEC then becomes engaged in the process of combining them. That is not the case. The nature of the building block process places the burden on the CLEC to determine how to provide telecommunications service to a customer, select the proper building blocks to serve that customer, insure those building blocks will work together, and purchase the individual building blocks from the ILEC[1]. As the CLEC purchases these individual building blocks and uses them, it is irrelevant whether the CLEC chooses to combine them in a manner similar to the manner that an ILEC would choose to provide service or in some unique manner. The ILEC merely installs[2] the individual building blocks ordered by the CLEC. The PUC should require the ILECs to install building blocks ordered by the CLECs. The PUC should not allow the ILECs to impose onerous restrictions and requirements intended to address recombining because the ILECs' installation activities do not constitute recombination.

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[1] Interestingly, the ILECs themselves recognize it is the responsibility of the CLECs to perfrom these tasks. For references, see footnotes 4 and 5.

[2] By "install," I mean to make the functionality of the individual building block available to the CLEC as ordered.

2. Necessity of the Changes Proposed by the ILECs

Q. WHAT IS YOUR ASSESSMENT OF THE NECESSITY OF THE CHANGES PROPOSED BY THE ILECS?

A. The changes that require CLEC collocation to combine building blocks are not necessary. In my Direct Testimony (Exhibit Staff/5, Breen/8-11), I chronicle steps the PUC has followed since 1990 to develop cost methods, define building blocks, and establish prices for those building blocks. If a CLEC requests the installation of a building block, it is the responsibility of the ILEC to install it.

"Resale" occurs when the CLEC requests one of the ILECs' retail services at a wholesale rate. Resale requires the ILEC to, in essence, analyze which building blocks are required and provision the proper combination of building blocks to make the service work. In a resale arrangement, the ILEC is not required to provision the service under the building blocks tariff.

The use of building blocks is different than resale. For example, to provide capability T, the CLEC may need to purchase building blocks A, B, and C. To purchase under the building blocks tariff, the CLEC is responsible for ensuring that A, B, and C work together to provide the required capability. Under resale, the CLEC would request to purchase capability T. Unlike resale, the building blocks process does not allow the CLEC to request capability T. The CLEC must determine which building blocks are required to provide capability T and purchase those building blocks. It appears the ILECs have attempted to eliminate this distinction and claim that a CLEC request to purchase building blocks A, B, and C is equivalent to a request to purchase capability T. It is not the same and the PUC should preserve the distinction without imposing burdensome requirements that increase CLEC costs and

lower CLEC network quality[3].

The PUC should require the ILEC to install building blocks ordered by CLECs and allow the CLECs to combine the building blocks without restrictions. The CLECs will bear the cost of ensuring the building blocks work together, and the CLECs will bear the risk associated with the ability of individually purchased building blocks to work together.

Q. DOES USWC RECOGNIZE IT IS THE CLEC'S RESPONSIBILITY TO ENSURE BUILDING BLOCKS WORK TOGETHER?

A. Yes. For example, in the USWC Response to the Request[4], USWC indicates,

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[3] Exhibit Staff/16, Breen/1, provides a USWC diagram submitted in the USWC Response to the Request. As an example, assume the CLEC desires to purchase the Network Access Channel (NAC) and Network Access Channel Connection (NACC) building blocks from USWC. The CLEC would order a NAC that terminates on the vertical side (the NAC side) of the main distributing frame (MDF). The CLEC would order a NACC and specify the location of the NACC termination on the horizontal side (the NACC side) of the MDF and the jumper connection locations on the MDF. This scenario is shown by the building blocks labeled 1 and 6 and the jumper labeled A. On the other hand, USWC would require the CLEC to interconnect using the configuration labeled B rather than the jumper labeled A. The ILEC proposals increase CLEC costs by requiring the purchase of unnecessary building blocks. The ILEC proposals also lower CLEC network quality by requiring the purchase of unnecessary building blocks that provide more opportunities for network failures and more potential for diminished transmission quality.

[4] See USWC Response to the Request, question 15 b.

in part, "When a CLEC purchases unbundled network elements (building blocks) from U S WEST and reassembles these UNEs, the CLEC is responsible for all network engineering and traffic management associated with the recombined UNEs." In the Response to the Request[5], USWC states, in part, "In each scenario listed, the CLEC is responsible to specify to U S WEST each of the Oregon building blocks (unbundled network elements) it requires and combine each of these building blocks in the manner it chooses."

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[5] See USWC Response to the Request, question 24.

3. Reply to USWC testimony and USWC Response to the Request

Q. AT U S WEST/34, MASON/2-4, MR. MASON MAKES RECOMMENDATIONS CONCERNING CHANGES IN NONRECURRING RATES. DO THOSE CHANGES AFFECT THE NONRECURRING COST AND RATE ANALYSIS THAT YOU INCLUDED IN YOUR RECOMMENDATION AT EXHIBIT STAFF/12?

A. No.

Q. DO YOU AGREE WITH MR. MASON'S RECOMMENDATION AT U S WEST/34, MASON/5, THAT SWITCHED AND COMMON INTEROFFICE TRANSPORT AND DS1 NACC SWITCHED LINESIDE SHOULD BE REMOVED FROM THE TARIFF?

A. No. The Commission previously ordered the ILECs to sell these building blocks to the CLECs. Nothing has changed that would affect that requirement.

Q. PLEASE COMMENT ON USWC'S COLLOCATION PROPOSAL.

A. The proposal specifies terms and conditions for virtual and physical collocation and lists the proposed rate elements. It does not propose specific rates. Collocation, however, is not a prerequisite for the purchase of building blocks. A CLEC may use collocation arrangements, but it is not a requirement. For example, a CLEC can purchase entrance facilities that terminate on the USWC Single Point of Termination (SPOT) frame. From that point, the CLEC can purchase the individual building blocks (e.g., Distributing Frame Terminations, Jumper NACs, NACs, etc.) necessary to provide service to a customer.

A CLEC may also purchase a NAC, purchase a NACC, and purchase other building blocks to provide service without being collocated.

During a tour of the Capitol Central Office in Portland on September 24, 1998, I saw virtually collocated CLEC equipment used for interconnection. The

CLEC may purchase building blocks to use in conjunction with its virtually collocated equipment.

Q. DO YOU AGREE WITH MR. MASON'S RECOMMENDATION AT U S WEST/34, MASON/7, THAT LOOP DELOADING COSTS "SHOULD BE RECOVERED VIA THE NONRECURRING LOOP DELOADING CHARGE" AND "THE MAINTENANCE FACTOR SHOULD BE ADJUSTED TO REMOVE THESE COSTS"?

A. No. The costs associated with outside plant activities should be included in the recurring costs. These type of outside plant activities, such as USWC's loop deloading activities, are initially charged to an expense clearing account, account 6534 in this case, and then cleared to expense and investment accounts. I do not believe it is advisable to establish a policy of separately identifying and charging for all of the outside plant rearrangement expenses that may be associated with the myriad of situations that may arise or to establish a policy of including outside plant investments in nonrecurring costs. These types of expenses and investments are included in the recurring costs and that policy should continue to remain in effect.

Q. WHAT IS YOUR RECOMMENDATION CONCERNING USWC'S ILLUSTRATIVE TARIFF PROVIDED IN U S WEST/35 AND U S WEST/36?

A. The current tariffs have formed the basis for the analysis and testimony presented in UT 138 and UT 139. The illustrative tariffs provided in U S WEST/35 and U S WEST/36 make certain proposals. I did not identify any aspect of USWC's proposal that would modify my recommendations in my direct testimony, my reply testimony, or my oral testimony. USWC proposals in U S WEST/35 and U S WEST/36 that are consistent with the staff prior testimony should be accepted. USWC proposals that are not consistent with

the staff prior testimony should be rejected. The portions of the USWC proposed tariff language that are particularly unacceptable are the additional special construction charge provisions, the restrictions regarding combining of elements, and the deletion of certain building blocks.

4. Reply to GTE testimony and GTE Response to the Request

Q. DO YOU AGREE WITH MR. MCLEOD'S PUBLIC POLICY CONCLUSIONS STATED AT GTE/13, MCLEOD/6-18?

A. I agree with his assessment that the Telecommunications Act of 1996 allows two avenues for CLECs, resale and/or the purchase of unbundled elements. I disagree that the CLEC ordering of individual building blocks from the ILEC constitutes a combining of building blocks by the ILEC. GTE attempts to ignore the fact it is the CLEC's responsibility to purchase the correct individual building blocks and combine them to provide a service to its customer. GTE attempts to assert it is combining the building blocks under these circumstances. It is not combining the building blocks, it is merely installing each of the ordered building blocks. I agree with Mr. McLeod's statement that, "If the CLECs were allowed to purchase a platform of already combined building blocks to replicate the ILEC's retail service, however, it would have provided nothing more through the unbundling path than it provided through resale." (See GTE/13, McLeod/8). The key distinction is that the CLEC is not ordering "a platform of already combined building blocks" through this tariff. The CLEC is ordering individual building blocks. The CLEC is responsible for ensuring they work together. The CLEC must be able to purchase individual building blocks and combine them in the manner it sees fit, even if the result looks like a GTE retail service.

Q. AT GTE/13, MCLEOD/9-14, MR. MCLEOD RAISES CONCERNS REGARDING THE RELATIONSHIP OF RETAIL PRICES, RESALE PRICES AND BUILDING BLOCK RATES. DID THE PUC ALREADY ADDRESS THESE ISSUES?

A. Yes. He reiterates building block issues that have been previously considered

by the PUC[6].

Q. WHAT IS YOUR RECOMMENDATION REGARDING GTE ADVICE 611?

A. The tariff changes proposed by GTE in Advice 611 that are consistent with the staff prior testimony should be accepted and proposed changes that are not consistent with the staff prior testimony should be rejected. The portions of the GTE proposed tariff language that are particularly unacceptable are the interconnection to building blocks language shown on Sheet 9.01, the limitation of one building block per service request, and provisions listed under Time and Material Charges (the first bulleted item on Sheet 9.7.1 and the paragraph shown on Sheet 9.7.2).

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

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[6] See, for example, Order 96-188, page 42.

APPENDIX 3 - PUBLIC SERVICE COMMISSION OF UTAH UNE ORDER

In the Matter of the Interconnection Contract Negotiations Between AT&T OF THE MOUNTAIN STATES, INC., and U S WEST COMMUNICATIONS, INC., Pursuant to 47 U.S.C. Section 252.	)	DOCKET NO. 96-087-03
In the Matter of the Petition for Arbitration, Consolidation, and Request for Agency Action of MCIMETRO ACCESS TRANSMISSION SERVICES, INC., Pursuant to 47 U.S.C. § 252 (b) of the Telecommunications Act of 1996.	)	DOCKET NO. 96-095-01 ARBITRATION ORDER

ISSUED: April 28, 1998

BY THE COMMISSION:

We clarify herein decisions made in prior Arbitration Orders issued December 26, 1996, and March 27, 1997, respectively, in Docket No. 96-095-01 In the Matter of the Petition for Arbitration, Consolidation, and Request for Agency Action of MCImetro Access Transmission Services, Inc., Pursuant to 47 USC § 252 (b) of the Telecommunications Act of 1996 ("MCI Order") and in Docket No. 96-087-03 In the Matter of the Interconnection Contract Negotiations between AT&T Communications of the Mountain States, Inc., and U S West Communications, Inc., Pursuant to 47 USC Section 252 ("AT&T Order"). We also decide remaining issues presented for resolution by US West Communications, Inc. ("USWC"), AT&T of the Mountain States, Inc. ("AT&T") and MCImetro Access Transmission Services, Inc. ("MCI") and argued in briefs filed by the above parties to this arbitration. [1]

The subject arbitrations have been before the Commission since September, 1996 when petitions for arbitration were filed by AT&T and MCI pursuant to § 252 of the federal Telecommunications Act of 1996 ("1996 Act") and state law. Following arbitration hearings held in October, 1996, the Commission issued on December 2, 1996, an interconnection agreement between AT&T and USWC in the AT&T Arbitration which was followed on December 26, 1996 by the MCI Order. Technical conferences were held January 16 and January 24, 1997 to discuss the status of negotiations between the parties and issues addressed in the December 2, 1996 interconnection agreement and the MCI Order. On March 27, 1997, the

[1] Separately filed requests for arbitration by AT&T and MCI were previously consolidated by a Commission directive in the MCI Order that MCI participate in Docket No. 96-087-03.

Commission issued an interlocutory order in the AT&T arbitration. Following multiple requests by parties for enlargements of time, a non-executed Agreement for Local Wireline Network Interconnection and Service Resale Between AT&T/MCI and USWC was filed by the parties on June 27, 1997 ("interconnection agreement"). Briefs were filed in June, 1997 in support of or opposition to contractual provisions of the proposed interconnection agreement, and Supplemental Briefs were filed in August and September, 1997 in response to issuance of the FCC's Shared Transport Order and decisions by the Eighth Circuit Court of Appeals interpreting questions of law surrounding an incumbent's obligation to provide unbundled network elements in existing combinations.[2] Finally, a technical conference was held August 15, 1997 to apprise the Commission of progress made in negotiating salient but then unresolved interconnection issues. AT&T and MCI now ask the Commission to review the briefs and disputed provisions of the proposed interconnection agreement, and order language for inclusion in final interconnection agreements between them and USWC. They express intent to finalize interconnection agreements with USWC in accordance with this order and submit executed agreements for Commission approval, thus triggering the approval process and decision schedule specified in § 252(e) of the 1996 Act.

We build in this order upon a foundation laid by state and federal law, by FCC rules, by current and proposed Commission rules and by prior interlocutory orders issued in this consolidated arbitration. In considering the decisions made herein we were cognizant of the record developed in four pertinent interrelated rulemakings conducted since passage of the state Telecommunications Reform Act of 1995 ("TRA95") and the 1996 Act. Those proceedings, in which parties to this arbitration actively participated, resulted in promulgation of initial rules regarding local interconnection (R746-348), competitive entry (R746-349), universal service (R746-360) and intercarrier service quality (R746-365). In those rulemakings, we considered legal, policy and process issues associated with interconnection of the essential facilities and services of USWC and competing carriers.

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[2] On July 18, 1997, and October 14, 1997, the Court of Appeals for the Eighth Circuit issued decisions in Iowa Utils. Bd. v. Federal Communications Commission ("Eighth Circuit Decisions") that are pertinent to interconnection matters we consider in this docket. On August 18, 1997, the Federal Communications Commission ("FCC") issued its Third Order on Reconsideration in Docket 96-98 In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 ("Shared Transport Order"). On January, 26, 1998, the US Supreme Court granted petitions for certiorari to review three elements of the Eighth Circuit decisions. Those elements include whether proper jurisdiction to establish costing methods and prices for unbundled elements and resale services resides with the FCC or state commissions; whether incumbents must recombine unbundled network elements for competitors; and, whether the FCC or the court's interpretation of the most favored nation provision in §

This order arbitrates unresolved issues using the numbering protocol presented in briefs and in an "Issues Matrix-Utah Interconnection" attached to correspondence to the Commission dated July 1, 1997, from counsel for MCI. We consolidate certain issues for discussion and decision where similarity of context makes it appropriate. It is the Commission's intent that this order be final and that USWC and AT&T, and USWC and MCI, respectively, submit within thirty days of this order fully executed initial interconnection agreements which embody the decisions made herein.

existing tariffs to recover costs of special construction undertaken on behalf of AT&T/MCI. They argue that special construction tariffs represent prima facie evidence of customary industry practice. At the August 15 technical conference, USWC argued, correctly we believe, that the Eighth Circuit's rendering of § 251(c) means it is not obligated to construct facilities at AT&T/MCI's behest even if AT&T/MCI are willing to pay for it. USWC proposes to defer consideration of a competitor's request for special construction to the Bona Fide Request (BFR) process [section 48]. USWC also argues that by virtue of vacating CFR 47 51.305 (a) (4) and 51.311 (c), the Eighth Circuit held that § 251(c)(2)(C) requires them to only provide access to their existing network, not an unbuilt superior one.

AT&T/MCI create a nexus between USWC's ability to levy special construction tariffs on them and its ability to levy special construction charges on its own end users for similar construction. AT&T/MCI argue they should not be bound by monopolist special construction tariffs pre-dating the 1996 Act. If USWC or entrants coming in after AT&T/MCI benefit from special construction they paid for, then claim AT&T/MCI, they should receive a refund of a share of the sunk costs they paid in special construction tariffs, or, pursuant to a "request quote" for network elements or interconnection ordered under the BFR process.

In our Phase 1 Order in Docket No. 94-999-01, we ordered that resellers be assessed special construction charges pursuant to then-effective tariffed terms and conditions for line extension, facilities reinforcement or land developments. We concluded that any tariff charges so imposed should apply to resellers in the same manner special construction charges would apply to any similarly situated individual or group of USWC's retail customers. With regard to AT&T/MCI's purchase of unbundled network elements, we do not distinguish herein the basis for applicability of non-recurring special construction tariffs as opposed to the commercial transaction contemplated by the BFR process. We leave that to the express terms of special construction tariffs and circumstances attendant to

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252 (i) shall stand.

specific situations requiring construction.

We disagree with USWC's contention that the Eighth Circuit decision would hold that the 1996 Act does not require it to provide access to a network superior to that it now operates. We conclude that §251(c)(3), which governs USWC's obligation to provide unbundled access to network elements, qualifies the whole cloth of § 251 by requiring that access to unbundled network elements be "in accordance with the requirements of this section and section 252". §252(e)(3) preserves our authority to establish and enforce requirements of state law in review of negotiated or arbitrated interconnection agreements under that section. Our efforts are thus guided by Utah telecommunications law, particularly the policy declarations enumerated in UCA 54-8b-1.1 requiring, for example, that new technology, an advanced infrastructure and economic growth attributable to telecommunications competition, not be inhibited.

We also disagree with the notion advanced by AT&T/MCI that tariffs predating passage of the 1996 Act have a bearing on payment for construction work performed today. That such tariffs were imposed in a monopoly environment is immaterial. We find incorrect AT&T/MCI's argument that USWC can effectively amend the terms of a private contract by unilaterally changing its tariffs without AT&T/MCI's consent. We view USWC's special construction tariffs as a public contract granting AT&T/MCI a right to complain under applicable Commission rules. Similarly, the BFR process allows parties to seek expedited resolution of a disputed construction quote.

We find reasonable AT&T/MCI's assertion that they receive a refund to reflect a prorata share of special construction costs previously paid USWC that subsequently benefit USWC or a third carrier. If another CLEC or USWC receive benefit from facilities initially constructed and dedicated for AT&T/MCI's exclusive use, AT&T/MCI should be compensated upon commencement of joint use, whether in the form of return of special construction charges paid, joint use tariffs or other meet point billing arrangement. We find this consistent with the spirit of ¶ 40.4.3 (b) of the interconnection agreement where subsequent collocators paying USWC's "training labor" rate element would trigger a refund from USWC to AT&T/MCI, as the initial collocator, of one-half of training expense paid to USWC by a third party collocator.

Accordingly, we order that ¶ 3.1 of the final interconnection agreement be modified so as to reflect AT&T/MCI's entitlement to a refund of a prorata portion of

previously paid special construction charges incurred by AT&T/MCI for exclusive use of facilities which are subsequently shared by joint users or concurring carriers. We order that language proposed by both parties be consolidated for inclusion in the final interconnection agreement:

Issue 3. - .31 -- Shared Transport

Issue 7. - .39 -- Unbundled Network Element Platform

At issue is whether the law requires USWC to make available a platform of combined network elements, defined in this instance as a single network element comprising shared interoffice facilities, which could be disaggregated into multiple network elements available for individual purchase by AT&T/MCI. Shared transport is defined as direct trunk facilities and associated transmission routing information for telecommunications carried between USWC end offices within a local calling area. In its Shared Transport Order, the FCC defined it as "interoffice transmission facilities shared between the incumbent LEC and one or more requesting carriers or customers, that connects end office switches, end office switches and tandem switches, or tandem switches, in the incumbent LEC's network." The order affirms a conclusion the FCC reached in its Local Interconnection Order that "incumbent LECs are obligated under section 251(d)(2) to provide access to shared transport....as an unbundled network element." The FCC concluded that restrictions on access to shared transport facilities "would impose unnecessary costs on new entrants without any corresponding, direct benefits." The primary issue we decide is whether USWC must allow AT&T/MCI access to the same local interoffice facilities used to transport it's own traffic between central offices.

The term shared transport nominally camouflages the divergent perspectives embraced by each party's proposed single ¶ 5 of Attachment 3 to the interconnection agreement. The weight the parties and the industry attach to this issue make it the most significant we decide in this case. The record evidences polar interpretations by USWC and AT&T/MCI of the FCC's Shared Transport Order and the Eighth Circuit Decisions. AT&T/MCI claim that USWC must by law provide unbundled access to shared interoffice transport facilities, while USWC advances that AT&T/MCI seek to impose obligations upon it that have no basis in the Act. As noted, both parties filed Supplemental Briefs following issuance of the above decisions which argue their perspective on shared transport and recombination, or rebundling, of unbundled network elements. Much of the debate between incumbents and interexchange carriers on shared transport and Issue 7. -39, Unbundled Network Element Platform (All Network Elements in Combination), centers on

the Eighth Circuit's failure to vacate FCC rule 47 C.F.R. § 51.315(b) which provides that: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines."

USWC urges us to modify the interconnection agreement with AT&T/MCI to delete any language purporting to require USWC to combine or recombine network elements for the benefit of AT&T/MCI, even if those elements are already "combined" in USWC's network. USWC proposes to delete all reference in the agreement to "combinations" noting in a footnote that "a search of the proposed contract ...reveals that the words "combine" or "combination" is used 34 times, 8 of which do not...relate to the issue of shared transport or recombination of network elements." USWC avows that its proposal conforms with the Act and FCC rules requiring that access to its central offices be on dedicated[3] as opposed to shared common transport[4] links. In USWC's view, switching and interoffice transport cannot be combined to form shared transport. USWC argues that shared transport inherently requires the combination of transport with switching functionality so that a carriers traffic is not separated and delivered to carrier-specific facilities controlled by individual interexchange carriers, as is done with common transport available in USWC's switched access tariff. Said another way, USWC argues that defining unbundled local switching to include shared trunk ports would effectively fail to unbundle local switching from transport.

USWC contends that shared transport is not a network element which it defines as

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[3] USWC cites no authority for its assertion that the FCC requires it to provide local interoffice transmission facilities between central offices as dedicated facilities. Dedicated transport links are defined by Commission rule R746-348-2(3) to mean "transmission facilities between two switching systems where traffic originates with or terminates to the same or another public telecommunications service provider". We note that the subject interconnection agreement, like most approved by the Commission, provides in ¶ 10.4.2 of Attachment 4 that dedicated facilities will be used between end offices when traffic reaches volume equivalent to 512 Centum Call Seconds. Besides dedicated links, common transport links are defined by R746-348-2 to mean "shared transmission facilities between two switching systems where traffic originating with or terminating to multiple telecommunications service providers is commingled".

[4] We note here a distinction in the use of the term "common transport" which AT&T/MCI and USWC sometimes use in different contexts. In a switched access context common transport is an exchange access service purchased by interexchange carriers which commingles the traffic of multiple joint users on shared facilities for routing to USWC's tandem switch. An interexchange carrier purchasing common transport pays usage and distance-sensitive tandem transmission rates, a tandem switching charge and a local switching charge for call termination at the destination end office. USWC holds that its interexchange access tariff is the only source from which shared interoffice transmission facilities providing common transport between USWC tandems and end offices can be purchased. In contrast, AT&T/MCI view common transport in a local interconnection context where local interoffice trunking and transmission facilities between end offices are shared between USWC and all CLECs. Common and dedicated transport

a facility or equipment that "must be unbundled"and "must be able to stand alone." The network, USWC contends, is never actively or logically "combined" in any inherent or permanent manner, citing as an example "hundreds of unbundled network elements" comprising the local interoffice network in the Salt Lake City local calling area, all and each of which are available to AT&T/MCI in the interconnection agreement as unbundled network elements. USWC claims its network is made up of dedicated interoffice transport facilities, multiplexers, switch trunk ports and call routing all of which are only momentarily "combined" to route a particular call.[5] AT&T/MCI'S use of the term "shared transport facilitates", according to USWC, would not involve a discrete, identifiable component of the network, but rather a complex aggregation of network elements that combine to form a "service" that delivers telecommunications through alternative paths based on route availability at any given moment.[6] Finally, USWC claims that routing tables in its tandem switches are functionally not severable from its interoffice transport routes.

USWC's position, in summary, is that transmission facilities between its end offices are not shared facilities it must make available to AT&T/MCI as common transport links connecting its end offices within a local calling area. Rather, USWC considers its interoffice facilities dedicated exclusively to carriage of only its own traffic between those end offices. In order to obtain a feature, function or capability as a network element, AT&T/MCI must order a discrete facility or equipment from USWC for a period of time. USWC claims that proposition will not inhibit AT&T/MCI's provision of local telecommunications service.

To the degree AT&T/MCI seek a preassembled platform ready to provide finished service, USWC responds that resale services already provide a full service local offering. USWC coins the phrase "sham unbundling" to describe the notion that AT&T/MCI's purchase of a combined platform of unbundled network elements in lieu of purchasing an

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would still be available as switched access services for use in delivery of toll traffic.

[5] USWC argues that the network interface device, the local loop and the switch port are the only network elements dedicated to a particular end-user. When a customer places a call, the USWC network will choose a route depending on network loads and combine particular elements for the duration of that one call. When the call is complete, the elements become uncombined and available for reassembly in different combinations to handle the next call.

[6] AT&T/MCI assail as "semantic gamesmanship" USWC's claim that it combines elements when routing a call. AT&T/MCI profess that USWC does nothing to "combine" elements when a call is routed through its network noting that the switch and signaling system are what determine the call path and which transport elements will be used to complete a call. AT&T/MCI call these "unified elements" because they are conjointly used to transmit and route calls, and because a new entrant could not provide any finished switched service without them.

assembled wholesale service would be an "utter sham". AT&T/MCI seek to have USWC combine the network elements necessary to provide local exchange service into a platform for purchase at a price established by a forward looking cost model that is less than the "avoided retail cost" standard used to establish wholesale prices, according to USWC. USWC avers that AT&T/MCI will benefit from the dual entry strategies of using both resale and a package of unbundled network elements without incurring the corresponding and variable risk attached to each entry strategy.

The Eighth Circuit held that the proper standard used to determine which elements must be unbundled is the "necessary and impairment" standard. The Court acknowledged higher capital and business risk associated with a facilities-based entry strategy premised on use of unbundled network elements relative to a resale entry strategy. On that basis, USWC urges us to revise the interconnection agreement to delete any provision which purports to shift business risk and up-front investment associated with entry. Business risk, according to USWC, should not be shifted to it but rather must be incurred by AT&T/MCI unless they seek to mitigate risk by entering the market as a reseller. Like an incumbent, if a CLEC wants to be a facilities-based provider, even if exclusively through the use of unbundled elements, USWC argues that the CLEC "must make an up-front investment in all elements of the network (end-office to tandem trunks, end-office to end-office trunks, local switching, tandem switching, etc.) without knowing whether demand will be sufficient to cover the cost" of its business plan. USWC asserts that is not an improper "impairment" of service.

AT&T/MCI seek to use USWC's end-office to end-office trunks in the same manner USWC uses them.[7] Their proposed ¶ 5 would require USWC to share all network elements comprising local interoffice network facilities in a manner incorporating existing efficiencies in switching and routing configurations. AT&T/MCI claim network traffic flows would maintain much of the same path and volume as today with shared facilities. AT&T/MCI proffer to purchase USWC's local interoffice transport network as a platform at local interconnection rates that, like common transport, are usage[8] and distance-sensitive

[7] USWC routes its own local interoffice traffic approximately 80% of the time over direct transport links between end offices. When direct interoffice trunks are carrying peak loads, traffic is overflowed to a tandem switch where it is again switched and rerouted to the destination end office. We note that AT&T/MCI agree to pay USWC's tandem transmission and switching charge when their traffic levels exceed USWC's direct trunking capacity and are overflowed to the tandem. In contrast to the above, USWC would tandem-route all AT&T/MCI traffic entering its network unless AT&T/MCI establish dedicated trunking between their switch and USWC end offices.

[8] USWC argues that usage sensitive pricing which occurs after consumption of network capacity

and determined by either the Hatfield model or USWC's cost model.

AT&T/MCI explain that USWC's proposal would leave them two undesirable traffic routing options. First, AT&T/MCI could route traffic between end offices using common transport in a switched access context where interoffice facilities are shared only between an AT&T/MCI end office and USWC's tandem. AT&T/MCI would incur tandem transmission and switching charges inasmuch as all their customer traffic would pass through USWC tandems, while USWC's traffic would not incur those charges because it would be routed over direct interoffice trunks. The second option is that AT&T/MCI could build, lease or purchase dedicated transmission facilities between their switch and USWC end offices, and the offices of competing carriers. AT&T/MCI argue that would require them to buy direct dedicated transport between dozens of USWC end offices, thereby replicating USWC's interoffice trunking network, a prospect AT&T/MCI say constitutes construction of a "shadow network" between USWC end offices. AT&T/MCI assert such a duplication of trunking already in place would not be economically viable. They contend both options are patently discriminatory and would prevent AT&T/MCI from effectively competing for local service customers. AT&T/MCI conclude that USWC's position is inefficient, discriminatory and creates a barrier to market entry that would substantially and artificially increase the cost of competitive entry in violation of the Act.

Exacerbating the inequity of USWC's first proposed option, in AT&T/MCI's view, is the deleterious effect on transmission quality that would result if AT&T/MCI's traffic is shunted to a bottlenecked switch. USWC acknowledges problems provisioning adequate switch port capacity and trunking in and out of their tandems. The absence of such capacity has contributed to blockage of calls terminating to ELI and NextLink[9]. Requiring AT&T/MCI to route through the tandem places an additional burden on interoffice routes and tandem switches, thus increasing the likelihood of interoffice call blocking, a minor problem now in comparison to the blocking that would occur if all AT&T/MCI traffic were tandem-routed. AT&T/MCI assert that customers would invariably encounter service delays, interruptions and blocked calls associated with USWC's inability to handle competitor traffic flows.

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shifts business and engineering risk associated with capacity planning to it while eliminating that risk for AT&T and MCI.

[9] AT&T/MCI's claim that USWC is constrained in its ability to timely provision trunking and tandem interconnection facilities is credible. That became apparent to us as a result of the Joint Provisioning Team technical conferences (see Issue A.-20).

As with the manner in which parties use the term common transport, the absence of consensus about the meaning of other defined terms causes confusion in their application. We refer below to the definitions of network element, unbundling and shared interoffice facilities, and clarify our reading of their meaning.

The Eighth Circuit affirmed both the FCC's authority to define unbundled network elements under §251(c)(3), and the network elements so defined. The Court upheld FCC rules codified in 47 CFR § 319 which itemize and define seven unbundled network elements incumbent LECs must make available, including interoffice facilities. It concluded the rules were reasonable and entitled to deference. The Court further concluded that an entrant had the right to "achieve the capability to provide telecommunications service completely through access to unbundled elements". And, importantly to this decision, it adopted the FCC's view that network elements include the functionality of the facilities and equipment that make up an incumbent's network.

USWC argues that AT&T/MCI's use of the term "shared facilities" is not consistent with the FCC's "interoffice transmission facilities" definition. The FCC defines interoffice transmission facilities in 47 C.F.R. §51.319(d)(1) as "incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers." Following subsections of §319(d) require the incumbent LEC to provide a requesting carrier: (i) either "exclusive use" of dedicated interoffice facilities, or, alternatively, "use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier"; (ii) all transmission facilities, features, functions and capabilities that attach to interoffice transmission facilities; (iii) connection to the facilities; and, (iv) the functionality provided by the incumbent's digital cross-connect systems in the same manner that the incumbent provides such functionality to interexchange carriers.

USWC argues that the definition of network element in the 1996 Act and FCC rules does not support an interpretation that a requesting carrier can purchase undifferentiated access to network capabilities. We disagree. Shared transport is differentiated by the codification of statutory intent in state and federal rules. The 1996 Act defines "network element" as a "facility or equipment used in the provision of a telecommunications service" including "features, functions and capabilities that are

provided by means of such facility or equipment....or used in the transmission, routing or other provision of a telecommunications service". Similarly, Commission Rule R746-348-2 defines network element to mean the "features, functions and capabilities of network facilities and equipment used to transmit, route, bill or otherwise provide public telecommunications services". The same rule defines "unbundling" to mean the "disaggregation of facilities and functions into multiple network elements and services that can be individually purchased by a competing public telecommunications service provider". We find that both federal and state definitions of network element expressly recognize transmission and routing as implicit network functions included in the definitions of "interoffice facilities" and "network elements" subject to unbundling. We find that the functionality and capability of network elements is subsumed in the plain meaning of how they are defined. We conclude that the network functions of transmission and routing cannot be divorced from the transport link over which a call travels.

It is clearly not the intent of UCA 54-8b-2 that AT&T/MCI be left with what we find are two inferior options for traffic routing, i.e., dedicated links replicating USWC's network or common transport links with tandem-routing. In defining common transport links, Commission Rule R746-348-2 contemplates applicability to local interconnection as opposed to switched access, insofar as the term does not expressly exclude local end office to end office routes. While the rule acknowledges the prevalent definition of common transport generally associated with switched access, which encompasses tandem-routing, it does not define common transport to exclusively require end office to tandem routing. That non-exclusivity requires that we consider local end office to end office routing outside of a switched access context. We find cause to distinguish exchange access from local interconnection for purposes of providing common transport links. We find the definition of common and dedicated links permissively allows purchase of individual or combined network elements from a pool of disaggregated elements used to transport and route telecommunications over facilities that may be either common or dedicated. We conclude that the disaggregation inherent in the definition of unbundling goes to the pricing and availability of a network element rather than to whether or not a facility can be further separated into discrete network functions dedicated for exclusive use.[10]

[10] The Eighth Circuit Court did not reach whether or not interoffice facilities, as a network element, is defined so as to be limited to facilities or capacity dedicated for exclusive use. However, by not vacating the FCC's definition of unbundled local switching and signaling, the Eighth Circuit implicitly preserved the right of an entrant to purchase a network element for a non-exclusive, transitory period of time while the element is needed to perform a function involved in providing service. See 47 CFR 51.309 (c).

In determining what network elements are to be made available under §251(c)(3), §251 (d)(2) (B) of the 1996 Act requires the FCC to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer". In addressing shared transport in its Local Competition Order, the FCC found that a §251(d)(2) competitive "impairment" would occur if a failure to grant access to an unbundled element would increase the cost or decrease the service quality of market entry. The FCC concluded that §251(d)(2)(B) "requires incumbent LECs to provide access to shared interoffice facilities and dedicated interoffice facilities ...between an incumbent's end offices, new entrant's switching offices and LEC switching offices and digital cross connects." We reach the same conclusion in interpreting the intent of §251(d)(2) of the Act, UCA 54-8b-2.2(1)(c) and our own interconnection rules. We conclude that if AT&T/MCI are denied access to shared transport, their ability to provide the services they seek to offer would be impaired. The impairment arises as a result of the unduly prejudicial method of routing and transport offered them relative to the method USWC uses to route and transport its own traffic.

We conclude that AT&T/MCI should be able to share common transport routes including end office to end office links that predominantly carry USWC traffic. We find that the cost burden associated with both the tandem and dedicated transmission options violates Section 251(d)(2)(B) of the 1996 Act, as codified in 47 CFR 51.309(a).[11] We find that tandem transmission would discriminatorily consign AT&T/MCI's traffic to a more costly transmission path with intermediary switching. We find evidence that tandem routing AT&T/MCI's traffic is likely to decrease the quality of interconnection and exacerbate call blocking. Alternatively, if transport and routing facilities are dedicated for AT&T/MCI's exclusive use, the financial and administrative cost would be greater than the cost of facilities shared by multiple joint users, including USWC. We conclude that arrangement would be contrary to law. In both instances we find the interconnection service to be discriminatory, inefficient and contrary to UCA 54-8b-2.2(1)(b)(ii) and 251(c)(3) of the 1996 Act.

We have found that local interoffice calls should be routed in parity with USWC's call

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[11] 47 CFR § 51.309 (a) prohibits an incumbent from imposing "limitations, restrictions, or requirements on requests for . . . unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service."

routing in part because federal and state law explicitly prescribe a policy of non-discrimination. The 1996 Act unambiguously states at § 251(c)(2)(C) that USWC must provide interconnection for transmission and routing of telephone exchange service and exchange access that is "at least equal in quality to that provided by the local exchange carrier to itself".[12] §252(c)(1) mandates that we uphold that standard in deciding the shared transport issue. UCA 54-8b-2.2(1)(b)(ii) requires that interconnection be provided on "terms and conditions, including price, no less favorable than those the telecommunications corporation provides to itself". USWC acknowledges it is required by law to offer AT&T/MCI service at least equal in quality to that which it provides itself and its customers. In summary, we conclude, as did the FCC but for Utah-specific reasons, that denying AT&T/MCI use of USWC's local interoffice network would be discriminatory and violate the above statutes because it would artificially increase AT&T/MCI's cost to provide public telecommunications services.

We find no cause at present to elevate USWC's claim that AT&T/MCI will sham unbundle by arbitraging different pricing standards for unbundled network elements and wholesale services. We have not yet set final prices for unbundled network elements. The TELRIC of switching and transport will be examined in Phase 3 of Docket No. 94-999-01. At present, finished retail products purchased from USWC at wholesale discounts reflecting avoided retail cost are priced substantially less than the sum price for an equivalent combination of network elements purchased from interim unbundled element price schedules. There is no evidence of price distortions between avoided cost discounts and unbundled network element prices that create the arbitrage opportunity advanced by USWC.

USWC cites §271(c)(2)(B)(v) of the 1996 Act, which defines the fourteen point checklist for Bell company entry into in-region interstate toll services, in support of the notion that a network element must be able to stand alone and that shared transport causes trunk ports and transport to be combined. We find that singular reference misplaced and taken out of context because it is conditioned on the incumbent's compliance with §§251(c)(3) and 252(d)(1). We find the "unbundled from switching" reference in §271(c)(2)(B) (v) to be permissive and to refer to the availability of the network element.

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[12] 47 CFR § 51.313(b) provides that "the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to the UNE shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent provides such elements to itself."

We conclude that the section is not intended to obviate shared transport. Quite to the contrary, we conclude that the plain language of § 251(c)(3) imposes on USWC a "duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis...in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

USWC argues that the Eighth Circuit Decision would hold that upon receipt of an order for shared transport, USWC could sever existing connections between elements and require AT&T/MCI to undertake the task of reconnecting those elements.[13] AT&T/MCI maintain that USWC's position would circumvent the clear requirement of 47 CFR 51.315(b) that it leave in place network elements that are already combined. In its Shared Transport Order, the FCC ruled that "dismantling of network elements, absent an affirmative request, would increase the costs of requesting carriers and delay their entry into the local exchange market, without serving any apparent public benefit". AT&T/MCI rightfully assert that when they order elements that are ordinarily and actually combined within USWC's network, USWC does not need to undertake any physical disconnection or connection activities within that combination to fulfill the order. AT&T/MCI point to the Court's distinction between recombining elements not ordinarily combined and keeping combined elements ordinarily combined, a point we find compelling.

Acknowledging that the Eighth Circuit Decision did not address C.F.R. § 51.315(b) in its decision, USWC asserts that does not imply that it intended to uphold it.[14] USWC insists that the Eighth Circuit held that the duty of combining unbundled network elements rests squarely on the requesting carrier. It strains credulity, according to USWC, to contend that the Court's failure to vacate §51.315(b) overrides its carefully reasoned holding that USWC cannot be forced to combine network elements for AT&T/MCI[15].

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[13] AT&T/MCI point out that USWC's proposal would require that a competitors engineers have virtually unlimited access to USWC's network facilities. At the August 15 technical conference, USWC said it was "studying the issue" of access by AT&T/MCI personnel to network elements for purposes of recombination.

[14] AT&T/MCI note that as a party with standing in Iowa Utilities Board v FCC, USWC specifically asked the Eighth Circuit to vacate the whole of § 51.315, however the Court only vacated 51.315(c) through (f).

[15] The Court said section 252(c)(3) of the Telecommunications Act of 1996 "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." It added that "unlike the Commission [FCC], we do not believe that language can be read to levy a duty on the incumbent LECs to do the actual combining of elements....The Act does not require the incumbent LECs to do all of the work."

USWC asserts that 51.315(b) was retained to prohibit an incumbent LEC from disassembling network elements into smaller, sub-elements, perhaps defined by a state commission, in a manner that would circumvent the intent of an FCC-defined network element.

We earlier noted that the Eighth Circuit's treatment of 47 CFR 51.315 has polarized perceptions about the intent of the Court's decisions. The Eighth Circuit did not vacate § 51.315(b), which prohibits an incumbent from uncombining network elements if the requesting carrier seeks to purchase them as currently combined. It did vacate 47 CFR 51.315 (c) - (f) which addresses recombinations of network elements not ordinarily combined in the ILEC's existing network. We conclude that by leaving 47 CFR 51.315 (a) and (b) intact when they considered and vacated 51.315(c) through (f) of the same section, the Eighth Circuit considered and chose not to preclude use of logically combined network elements, such as shared transport. We conclude, as did the FCC, that the Eighth Circuit's retention of CFR 51.315(b) forms a basis for concluding that shared transport is required by law.

We find that 47 CFR 51.315(b) prohibits USWC from separating unbundled elements. We find that separating and recombining unbundled network elements ordinarily combined in USWC's network is illogical, inefficient and violates state and federal law. We find it illogical, inefficient and discriminatory for USWC to use available combinations of elements to provide its own services, while requiring entrants to incur the delay and expense of separating and recombining them. Signaling networks and integrated software-defined operational support and network administration systems render shared transport a logically integrated system, or platform of network elements performing transport and routing functions. These integrated systems are not rationally disassembled or easily reassembled. We find that such action by USWC would impose costs on competitive carriers that incumbent LECs would not incur in violation of § 251 (c)(3) of the 1996 Act.

We believe the shared transport dispute encapsulizes important policy issues surrounding the types of competitive market development that will occur. We desire by this decision to be technologically neutral at a time when cell-switching, Internet protocol routing and digital subscriber line technology are at early stages of deployment. We found in deciding Issue A. 1-24, Call Transport and Termination, that USWC's hegemony over public switched network investment will not be a bottleneck to technological innovation. We similarly conclude that it should not distort capital formation or the capital investment

strategies of facilities-based competitors. If CLECs are denied use of local interoffice transport facilities, capital may flow to unnecessarily duplicative investments that might otherwise have capitalized technological innovation. At a time when USWC is not timely meeting transmission and switching capacity demand made by CLECs and its own end users, we do not want to entrench circuit-switched technology in the public network at the expense of investment that could mitigate circuit-switched network congestion by offloading data traffic.

UCA 54-8b-2.2(5) vests us with authority to "resolve...issues necessary for the competitive provision....of local exchange services" when a telecommunications corporation seeks to exercise a right to operate under authority granted by a certificate we have issued. The FCC concluded and we concur that shared transport "is particularly important for stimulating initial competitive entry into the local exchange market," thereby allowing CLECs to take advantage of USWC's "significant economies of scale, scope, and density in providing transport facilities." We find AT&T/MCI's proposed ¶ 5 to Attachment 3 consistent with federal and state law and with the development of local exchange competition in Utah. We order that it be included in the final interconnection agreement as written below:

5. Shared Transport

U S WEST will provide unbundled access to U S WEST transmission facilities between end offices, end offices and the tandem switch, and the tandem switch and end offices for completing local calls. Such transmission facilities would be shared with U S WEST and, as applicable, with other CLECs. Transport routing shall be on an identical basis as routing is performed by U S WEST, providing the same efficiencies that U S WEST employs for itself. Costs will be allocated appropriately based upon the transmission path taken by each call. Shared transport shall meet the technical specifications as itemized below for Common Transport.